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91-1562

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.
Petitioner,

v.

KELLY MERK, et al.,
Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 86-2723

KELLY MERK, et al.,

Plaintiffs-Appellees,

v.

JEWEL COMPANIES, INC.,

Defendant-Appellant,

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 7876—Marvin E. Aspen, *Judge.*

ARGUED OCTOBER 30, 1987—DECIDED MAY 31, 1988

Before FLAUM, EASTERBROOK, and MANION, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Jewel Companies, which operates a chain of supermarkets, reached a collective bargaining agreement with Local 881 of the United Food and Commercial Workers Union in September 1982. The agreement ran until June 1985. In December 1983 Jewel asked the Union to agree to a reduction in wages and benefits

notwithstanding the agreement. The Union refused. Jewel declared in February 1984 that an "impasse" had been reached and put its most recent proposal into effect. The result was a reduction of up to $1.25 per hour for about 18,000 employees.

Jewel claimed that it was entitled to reduce the hourly wage, notwithstanding the collective bargaining agreement, because it had an oral understanding with the Union that the question of wages would be reopened when a rival discount chain went into operation, which happened in the fall of 1983. The Union denied that it had made such a pledge and added that in its view an oral promise could not prevail over the written agreement. Its members overwhelmingly rejected a proposal to ratify the wage reductions. The Union invoked the arbitration clause of the agreement and asked the General Counsel of the National Labor Relations Board to issue a complaint charging Jewel with unfair labor practices. After Jewel refused to arbitrate the Union filed suit, and a district judge ordered Jewel to do so. The General Counsel eventually issued a complaint. Jewel was under the gun in two forums at once.

By then the collective bargaining agreement was nearing an end. Jewel and the Union tried to settle their dispute and reach a new agreement as a package. After hard bargaining they did so. Jewel agreed to restore most wages and benefits to the level provided in the 1982 agreement, retroactive to February 1984.[1] In June 1985 the Union's members ratified this agreement, roughly 80% voting in favor. The Union withdrew its request for arbitration, and at the joint request of Jewel and the Union the General Counsel dismissed the unfair labor practice charge. That dismissal is not reviewable. *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413 (1987).

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[1] The parties disagree about how close to full restoration and back pay this came. The dispute is not important for current purposes.

There was a catch. Only persons still employed on June 21, 1985, received back pay. Jewel takes the June 1985 agreement as a comprehensive settlement, extinguishing any rights of the 2,000 or so who retired, quit, or were fired between February 1984 and June 1985. The Union believes that the 1985 agreement, which is silent on the treatment of these employees, leave them to whatever devices they have under the 1982 agreement. In either case, Jewel was not making haste to give them cash, and the arbitration—which was within the Union's control—no longer offered them any prospects. Several of these former workers protested to the Labor Board's General Counsel, who ratified her decision to dismiss the complaint. They then filed this class action against Jewel and the Union, urging alternatively a breach of contract, reparable under §301 of the Labor-Management Relations Act, 29 U.S.C. §185, and a breach of the Union's duty of fair representation.

The district court granted summary judgment for the Union, concluding that it had no duty to represent—fairly or otherwise—persons no longer employed by Jewel at the time of the new contract. 641 F. Supp. 1024, 1027-32 (N.D. Ill. 1986). It could not breach a duty it did not owe. The tag-along "hybrid" contract/duty of fair representation claim against Jewel had to be dismissed as well. But the "straight" contract claim under §301 might have substance, the court thought, because Jewel paid the former employees less than the agreement specified. The Union, which was no longer the representative of the ex-employees, could not compromise their claims. The district court therefore denied Jewel's motion for summary judgment. It certified two questions under 28 U.S.C. §1292(b), and we accepted Jewel's interlocutory appeal.[2]

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[2] Jewel also contended that the suit is barred by the statute of limitations. The district court disagreed, 641 F. Supp. at 1032-37. Shortly after the district court's decision, we held in *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d

(Footnote continued on following page)

In this court, as in the district court, the parties assume that unless the Union fairly represented the former employees, Jewel's motion for summary judgment was properly denied. Jewel contends that the Union represented all of its present and former employees; the Union denies that it owed any duty to the former employees (but insists that, if it did, it represented them fairly); the plaintiffs maintain that the Union did not represent them (and that it sold them down the river, showing that any representation was inadequate). The district court concluded that the Union faced a hopeless conflict of interest. The former employees, no longer members of the bargaining unit, could not vote against any compromise, so that the officers of the Union had nothing to lose and everything to gain by giving away the ex-employees' rights in exchange for larger payments for current employees. The court concluded that the Union did not have, and if it had did not discharge, a duty to represent the former employees fairly.

We have some doubt whether this is the right way to approach the question. Perhaps if the Union did not represent the ex-employees, that simply left them to the mercy of Jewel. The entitlements established by collective bargaining agreements do not survive their expiration or

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[2] *continued*

222 (7th Cir. 1986), that "straight" §301 actions to enforce collective bargaining agreements would continue to be governed by the most analogous state statute of limitations, usually the period for breach of contract. The district court concluded that the most analogous period is given by Ill. Rev. Stat. ch. 110 ¶13-205, providing five years to sue on an oral contract. Whether five years or some other period is best, any period longer than 20 months is long enough to make this suit timely (it was filed in September 1985, and the claim arose no earlier than February 1984), and as Jewel does not suggest any period shorter than five years—other than the 90-day period for seeking arbitration and the six-month period now used for "hybrid" actions, both of which we rejected in *Home Elevator*, we agree with the district court that this suit is timely.

modification. So if, for example, the 1982-85 agreement had established a plan under which Jewel provided health benefits for its employees and retirees, the Union and Jewel would have been free to abolish those benefits for subsequent periods, even though the Union does not represent retirees. If the Union and Jewel had reached an impasse, Jewel would have been free to put into place its last proposal, which might not have included health benefits. *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988); *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311 (7th Cir. 1986); cf. *DeGeare v. Alpha Portland Industries, Inc.*, 837 F.2d 812 (8th Cir. 1988) (ERISA does not alter the rule of labor law in this respect). That the retirees had worked in earlier years in the expectation that they were receiving money today and health benefits later would not matter. Because of the time limit on the collective bargaining agreement, any subjective expectation they may have had is not enforceable. And the Union, which under *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), does not necessarily represent retired workers, may choose to negoitate an agreement that provides more for today's workers and less for retirees. This becomes effective against retirees on the employer's say-so; the lack of representation does not give the retirees rights greater than those provided in collective bargaining agreements. Perhaps Jewel and the Union could undo the expectations of ex-workers about wages, just as they could frustrate their expectations about health benefits and other deferred compensation (to the extent ERISA does not cause these rights to vest). The collective bargaining agreement, after all, is between the Union and the employer, not between the workers (with union as agent) and the employer. On this view the union and employer may modify "their" agreement and let the chips fall where they may. Perhaps too Jewel can be seen as having invoked in February 1984 a modification clause (albeit unwritten) of the collective bargaining agreement, just as it says, after which everyone got the contracted-for wage between February 1984 and June 1985; when in June 1985

the Union negotiated "back pay" this was in the nature of a bonus for existing employees (in lieu of higher future wages) rather than reparations for an established wrong. The Union had no duty to any former employee in June 1985, so these persons cannot complain that the Union did not get them a "signing bonus" too: they did not sign and did not agree to reduce their future wages in exchange.

This is not necessarily the right way to look at the subject, however. The former employees do not contend that the terms of the 1982-85 collective bargaining agreement survived its expiration. They simply want the terms honored during the years they were in force, when, they contend, they were third party beneficiaries. Once they left Jewel's employ, as they see things, the Union lost any control over their fate. Had the Union agreed in June 1985 that its existing members would receive no back pay, the plaintiffs believe that this would not have affected their claims, which "vested" (the plaintiffs say) hour-by-hour as they worked between February 1984 and their last day at Jewel. This could create a bargaining nightmare, because no one could represent all of the former employees, and Jewel could not settle their claims even if it treated them exactly as it treated those who continued to work. It is not, however, such a fanciful position that we can reject it out of hand. Because the district court proceeded on the assumption that Jewel could not change the terms unilaterally once the 1982-85 agreement expired, and the parties have not briefed this question,[3] we resolve the case on the terms on which it was presented.

The district court asked the question: Is the Union the representative of the ex-employees, capable of compromising (here, extinguishing) their contractual rights? It answered "no" for two reasons: the former employees are

[3] Except for an allusion in note 1 of Jewel's reply brief, which is too little, too late.

not "employees" under §2(3) of the National Labor Relations Act, 29 U.S.C. §152(3), so that the Union is not their statutory representative; and in any case the Union faced such a conflict of interest that it could not fulfill its implied duty of "fair representation", see *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967), and again is forbidden to compromise their claims. We start with the second point.

Conflicts among members of a union are inevitable and do not prevent a union from representing all employees in the bargaining unit. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). See also *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964). Older employees may want the union to obtain seniority systems and hefty pension plans, while younger employees may prefer wage scales linked to productivity and may want cash now rather than pensions later. As *Pittsburgh Plate Glass* demonstrates, unions face a conflict between benefits for active workers and benefits for the retired. Members will disagree about how to meld seniority lists in the event of a merger; some will prefer endtailing, some dovetailing. See *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976). Current members may like their high pay, while employers may want to reduce the average wage; union and employer therefore may agree that employees hired in the future (who by definition are not yet members of the bargaining unit) will receive lower pay. A two-tier wage structure poses many of the same problems as the two-tier settlement in this case. The list of potential conflicts can be extended indefinitely. Unions resolve these in bargaining, and they are not disqualified from representing members of the bargaining unit just because some members will benefit at the expense of others. There may be no satisfactory way to resolve the conflicts even in principle. See Mayer G.

Freed, Daniel D. Polsby & Matthew L. Spitzer, *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. Cal. L. Rev. 461 (1983). Congress has required unions to deal with conflicts by *considering* the interests of each group (the duty of fair representation) and by conducting internal operations in a democratic fashion. These statutory guarantees, coupled with the pressure the incumbent union faces from others seeking to organize the employees (or from the threat of decertification and non-union operation), induce unions to make reasoned choices. They will not be perfect, but they are apt to be good. See Comment, *The Union Judgment Rule*, 45 U. Chi. L. Rev. 980 (1987) (discussing the different sources of marketplace pressure leading unions to represent their many constituencies fairly well).

Sometimes the success of these devices—whether internal union politics or the threat of replacement by a new and better union—will be apparent. Suppose the Union, desirous of preserving a reputation for effective representation (in order to attract new members), had insisted that Jewel treat equally all who worked between February 1984 and June 1985, whether or not they were still on Jewel's payroll. Equal treatment would suggest that the Union had represented past employees fairly in relation to its current members.[4] So it is not impossible to imagine the Union adequately representing former employees, any more than it is impossible to imagine a union representing retirees vigorously. Every union knows that its members eventually become ex-employees as they retire or change jobs. Some will remain in the industry (and stay as members); the Union wants to keep them happy; many of the 2,000 former employees of Jewel must still work in supermarkets. Even those who plan to leave both in-

[4] "Suggest" rather than "prove", because the Union might accept a low settlement (say, 10¢ on the dollar for all) in order to get higher wages and benefits in the next contract; these future wages would accrue entirely to the existing work force, just as the payment of back wages under the actual agreement did.

dustry and union (by retirement or a change in line of work) want the union to look after their interests when they go, and they treat ex-employees well today so that they may be treated well tomorrow. The employer, too, has an interest in just treatment of former employees, for it wants to attract new labor and has a reputation to protect. It will look after former employees' interests, to an extent, in bargaining. Cf. Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. Chi. L. Rev. 1061 (1984). The potential for conflict among groups of employees therefore does not mean that a union is forbidden to attempt to broker the interests of the different groups. If it did, the idea of "exclusive representation", a bedrock principle of the NLRA, would quickly be lost. *Steele*, the first of the "fair representation" cases, concluded that only "hostile discrimination" (323 U.S. at 202-03) among members in negotiating a collective bargaining agreement violated the duty. See also *Flight Officers v. United Air Lines*, 756 F.2d 1274, 1281 (7th Cir. 1985). Certainly many a conflict arises, and is resolved, without such discrimination. Cf. James D. Holzhauer, *The Contractual Duty of Competent Representation*, 63 Chi.-Kent L. Rev. 255 (1987).

Our case involves more than the run-of-mine conflict among workers, however. It involves a conflict between current and former workers. Under §2(3) of the NLRA, 29 U.S.C. §152(3),

> The term "employee" shall include any employee . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any . . . individual employed as a supervisor . . . .

Although the statute does not in terms exclude workers who have retired, quit, or been fired, the parties have followed the implication of *Pittsburgh Plate Glass* in treat-

ing §2(3) as if it did. Jewel's former employees therefore lost their status as NLRA "employees" when they left work for reasons other than a labor dispute or unfair labor practice. Although failure to implement the terms of a collective bargaining agreement may be an unfair labor practice if it is an end run around the bargaining process, *Westinghouse Electric Corp. v. NLRB*, 809 F.2d 419 (7th Cir. 1987); *Fall River Savings Bank*, 260 N.L.R.B. 911 (1982), so that those who quit in protest (like those fired in violation of the agreement) remain "employees", neither Jewel nor the Union has contended that any substantial portion of the 2,000 quit for this reason. Unions represent ex-employees all the time when trying to obtain their reinstatement under an agreement, or when pressing other claims connected with their departures. The Union did not treat these 2,000 former workers as "employees" for the purpose of voting on the new pact in June 1985, however, and Jewel did not treat them as employees for any purpose. Again we follow the parties' lead in assuming that the 2,000 former workers are not statutory "employees"—without deciding whether this question would have had a different answer had the parties chosen a different litigating strategy.

A union need not represent non-employees. *Pittsburgh Plate Glass* establishes this.[5] Representation is not forbidden, however; §2(3) excludes supervisors from the status of "employee", but unions may represent supervisors with their, and the employer's, acquiescence. 29 U.S.C. §164(a); *Florida Power & Light Co. v. Electrical*

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[5] The union may not, however, deliberately injure (on forbidden grounds) even those whom it does not represent in bargaining. *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952). The extent to which such wrongful conduct may support a finding of unfair labor practices is canvassed in Bernard D. Meltzer & Stanley D. Henderson, Labor Law 1133-45 (3d ed. 1985). The Board has held lawful under the NLRA a settlement that favored existing employees over departed ones, *Steelworkers Local No. 2869*, 239 N.L.R.B. 982 (1978), but this does not resolve the question before us.

Workers, 417 U.S. 790, 812-13 (1974). Cf. *NLRB v. Electrical Workers*, 107 S. Ct. 2002 (1987); *NLRB v. Hendricks County Rural Electrical Membership Corp.*, 454 U.S. 170 (1981). So too unions may bargain on behalf of retirees if the employer is willing, although the retirees need not accept the offer of representation. *Pittsburgh Plate Glass*, 404 U.S. at 181 n.20; *United Automobile Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1484 (6th Cir. 1983). Former employees might choose the union as their agent for purposes of implementing or compromising claims arising under a collective bargaining agreement. It is even possible that employees may assent through the agreement itself to make the union their agent to resolve all disputes arising out of the implementation of that agreement—disputes that by definition arise during the employment relation—even if they leave work before its end. Such a consent would enable the union and the employer to administer the agreement without the complications caused by a proliferation of parties as employees quit or leave. Perhaps consent of this sort should be implied from the presence of an arbitration clause, which appears to put the Union in charge of handling claims of current and former employees. Persons represented by a union and covered by a collective bargaining agreement—even those no longer working—must exhaust union remedies before filing suit under §301, see *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), which may imply that the union always administers the collective bargaining agreement even for those no longer classified as statutory "employees". Cf. David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 663, 774, 792, 811 (1973) (contending that collective bargaining agreements necessarily exclude the possibility of individual enforcement rights). Again, however, the parties have not discussed whether the former employees assented to representation by the Union—in the collective bargaining agreement itself or by acquiescing in the Union's pursuit of their rights through arbitration—or have exhausted their internal remedies. We do not speculate on the implications of such an approach for future litigation.

Having excluded other ways of looking at things, we are left with the district court's: that because the 2,000 former workers are not statutory "employees", the Union does not represent them. The Union owes no duty to those it does not represent. If it does not have a duty to represent them at all, it does not have a duty to represent them "fairly". The Supreme Court implied that duty from the statutory rule of exclusive representation. See *Steele* and *Vaca*. If the ex-workers are free to cut their own deals with Jewel, but let the Union bargain for them instead, then the Union's duty is fixed by the terms of any agreement creating these bargaining rights. The ex-employees' ability to shop for agents, to pit the union against members of the bar for the right to represent them on the claims, removes the foundation for implication of a "duty of fair representation". It leaves the plaintiffs in control of their own fate. And they have not compromised with Jewel their claims arising out of the 1982-85 agreement.

This is an unsettling conclusion, because it frustrates the ability of union and employer to resolve existing disputes. See *Republic Steel Corp.*, 379 U.S. at 653. Holdouts among the former employees may leave the dispute as a festering sore, undermining labor peace. Inability to reach a global settlement does not necessarily favor either employer or (ex-) employee; a settlement under a union's auspices presumably would reflect the chances of prevailing before an arbitrator or in court under a §301 suit, and former employees representing themselves may either settle on similar terms or press on to litigation, where they will win or lose but on average expect to get the same sort of deal that was reached in bargaining. The proliferation of persons with authority to bargain on their own will raise the cost of bringing the dispute to a conclusion, however, and the prospect of some ex-employees' suing and winning may make a union leery of compromising the claims of the current employees. The compromise will look bad in retrospect if ex-employees get 100¢ on the dollar. The net effect may be to delay settlement of

disputes and increase the risk borne by workers and employers alike.

Nonetheless, the parties' failure to make arguments that might have avoided this consequence leaves us with little choice. If the Union did not represent the plaintiffs *at all* in June 1985, then it is hard to see how it could have surrendered their claims. One of the Union's officers testified in a deposition that he perceived a conflict between current and former members of the bargaining unit and "absolutely" favored the active members. The plaintiffs were not part of the bargaining unit and were not notified of the settlement or offered an opportunity to vote on it.[6] The former employees did not receive any form of vicarious representation—that is, they did not get the same terms as those still employed on June 21, 1985. On the assumption, shared by all in the district court, that the "duty of fair representation" and the power to compromise the ex-employees' claims are necessarily linked, we hold that the Union did not have (and if it had did not fulfill) such a duty toward the plaintiffs in June 1985. The district court now must decide whether Jewel's unilateral reduction of wages and benefits in February 1984 violated the collective bargaining agreement.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[6] Jewel observes that the package deal settling the old dispute and adopting a new collective bargaining agreement passed by such a large margin that it would have been adopted had all 2,000 former employees appeared and voted "no". That may well be, but the former employees were excluded from the deliberations as well as from the voting, and we do not lightly assume that arguments made at union meetings are irrelevant to the members' decisions.

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APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 90-2184

KELLY MERK, JOSEPH STASZEWSKI, and VICKIE MENAGH et al., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

JEWEL FOOD STORES DIVISION OF JEWEL COMPANIES, INCORPORATED, AMERICAN STORES COMPANY, INCORPORATED, and UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL No. 881, chartered by United Food and Commercial Workers International Union, AFL-CIO and CLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 7876—**Richard A. Posner**, *Judge.*

ARGUED DECEMBER 13, 1990—DECIDED SEPTEMBER 27, 1991

Before CUDAHY, EASTERBROOK and RIPPLE, *Circuit Judges.*

CUDAHY, *Circuit Judge.* This case involves application of the parol evidence rule to the unique context of collective bargaining agreements. Specifically, we must determine the legal significance of secret oral negotiations between

union officials and company management that modify central terms of a collective bargaining agreement which was submitted to the union membership for ratification without any notice that it would be conditioned by additional terms.

I.

The relevant facts are as follows. Jewel Food Stores (Jewel) operates approximately 180 supermarkets in and around Chicago, employing over 15,000 workers who are represented by Local 881 of the United Food and Commercial Workers Union (the Union). In September 1982, Jewel and the Union began negotiating a new collective bargaining agreement (the CBA) to run from September 15, 1982 to June 15, 1985. Negotiations culminated in a contract which was reduced to writing and ratified by the Union membership on January 27, 1983. The CBA established wage rates, vacation leave and other terms of employment for the duration of the contract. Section 4.1 of the CBA, in particular, specified that "During the term of this Agreement, the Employer agrees to pay not less than the minimum wage rates set out in Appendix A."

Had the CBA embodied the entire agreement between the parties, this case would have been easily resolved. But the outcome of negotiations was not so straightforward. Anxious about the potential entry into the Chicago market of warehouse competitors such as Cub Foods, Jewel insisted that the CBA contain a "most favored nations" clause, a provision that would allow it to match the wages of unionized competitors opening in the Chicago market after the start of the contract term. The Union refused this demand throughout the negotiations, and the final compact did not include a most favored nations clause. Just before the CBA was approved, however, Union president Fred Burki and two Jewel representatives—Neil Petronella, chief negotiator, and Marsh Collins, corporate vice president—forged a secret deal at an informal hallway meeting late in the evening of January 23, 1983. The precise terms of that deal are in dispute: Union officials claim

that all they promised was to "sit and discuss" Jewel's competitive position once Cub Foods entered the Chicago market whereas Jewel executives contend that they agreed to "an economic reopener with full reservation of rights." An economic reopener provision permits the company to reopen all economic terms of the CBA upon occurrence of the condition precedent. Negotiations may then proceed as if the parties were bargaining over a totally new contract, and both sides retain their respective economic weapons, including the Union's right to strike and the company's right to lock out or unilaterally implement a final offer after bargaining to impasse. Whatever the terms of the secret oral agreement between Union officials and Jewel management, both sides affirm that it was never disclosed to or ratified by the Union rank and file even though ratification is required under the Union constitution and bylaws.

Cub Foods' entry into the Chicago market in 1983 precipitated this dispute. Shortly thereafter, Jewel announced the reopening of contract negotiations. On February 26, 1984, when negotiations reached impasse, Jewel unilaterally implemented its final offer, cutting the wages of its employees below levels mandated by the CBA. Jewel slashed wages by as much as $1.25 an hour and reduced vacation and personal day benefits as well. The Union immediately filed an unfair labor practice complaint and sued to compel arbitration. The district court ordered Jewel to arbitrate. After an arduous course of negotiations, the Union and Jewel finally resolved their longstanding dispute on the eve of expiration of the CBA: Jewel agreed to award backpay to its current employees while the Union pledged to relinquish its unfair labor practice complaint and the district court suit. At Jewel's insistence, however, the settlement abandoned the plaintiffs in this case—a class comprising approximately 2,000 Jewel employees who retired, quit or were fired during the protracted 15-month battle.

Claiming the back wages to which they believed they were rightfully entitled under the CBA, plaintiffs filed suit

against the Union for breach of its duty of fair representation and against Jewel for breach of contract. The district court granted summary judgment for the Union, ruling that the Union owed no duty of fair representation to former employees. 641 F. Supp. 1024 (N.D. Ill. 1986). In an interlocutory appeal, this Circuit upheld the district court's ruling, 848 F.2d 761 (7th Cir. 1988), and the Supreme Court denied certiorari, 109 S. Ct. 393 (1988).

Plaintiffs' breach of contract action against Jewel, however, proceeded to a one-week jury trial. After the jury returned a verdict in favor of Jewel, plaintiffs moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. The district court denied both motions, examining and rejecting each of plaintiffs' arguments in turn. Invoking the parol evidence rule, plaintiffs first contested the district court's admission of extrinsic evidence regarding the oral reopener to modify the provisions of the written CBA. But the district court submitted the parol evidence issue to the jury because it was not clear from the face of the CBA whether it was intended to embody the parties' entire agreement. The jury determined that the CBA was not integrated and the district court apparently agreed with this conclusion, upholding the jury's verdict as supported by the evidence. The district court also dismissed plaintiff's second argument, ruling that oral modifications to a written CBA do not violate national labor policy. Finally, it held that lack of ratification did not render the oral reopener agreement invalid. The jury found waiver of the ratification requirement based upon evidence of a past practice of adherence to unratified side agreements. The district court agreed with the jury's conclusion but broadly declared that, in any event, Jewel had a right to rely on the unratified oral reopener absent clear notice that the Union was acting in bad faith against the interests of its members.

On appeal, plaintiffs challenge the verdict against them on the following grounds. First, they claim that the district court improperly admitted evidence of the oral reopener agreement in violation of the parol evidence rule.

Second, they argue that the oral reopener agreement should not have been enforced because it violated the Union's constitutional requirement that significant terms of the labor contract be ratified by union members. Third, they contend that section 8(d) of the Labor Management Relations Act (LMRA) and national labor policy militate against enforcement of a clandestine oral reopener agreement that contradicts the terms of the written and ratified CBA. Fourth, they maintain that the district court committed numerous evidentiary errors, entitling them to a new trial. Finally, they contest the district court's dismissal of their claim for punitive damages.

II.

We review the district court's denial of judgment notwithstanding the verdict *de novo*, applying federal common law (rather than the law of any state) to this suit for breach of a collective bargaining agreement. *See Mohr v. Metro East Mfg. Co.*, 711 F.2d 69 (7th Cir. 1983). For Congress has accorded labor contracts a special status, authorizing the courts to fashion a body of federal common law governing their enforcement. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957) ("[T]he substantive law to apply in [breach of contract] suits under § 301(a) is federal law, which the Courts must fashion from the policy of our national labor laws."). This special solicitude reflects the fact that the collective bargaining agreement is more than a mere contract—it is "the charter instrument of a system of industrial self-government." *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring). Ordinary common law contract principles, therefore, cannot simply be imported whole into the labor context and mechanistically applied to collective bargaining agreements. To foster industrial peace and stability, we must instead read collective bargaining agreements with sensitivity to considerations of national labor policy.

A. The Parol Evidence Rule

We must first determine whether the parol evidence rule bars the admission of testimony regarding the secret oral agreement. The parol evidence rule provides that evidence of prior or contemporaneous agreements or negotiations may not be introduced to contradict the terms of a partially or completely integrated writing. *See* Restatement (Second) of Contracts § 215. A writing is deemed fully integrated if the parties intend it to be the expression of their entire agreement. If they intend the writing to be the final expression of the terms it contains but not a complete expression of all the terms agreed upon—some terms remaining unwritten—the agreement is termed partially integrated. *See* E. Farnsworth, Contracts 452 (1982). If a writing is only partially integrated, evidence of prior or contemporaneous agreements is admissible to supplement its terms though not to contradict it. If an agreement is completely integrated, however, not even evidence of a "consistent additional term" may be introduced to elucidate the writing. *See id.*; Restatement (Second) of Contracts § 215.

Whether a writing is fully integrated is generally a question of law to be resolved by a court. *See Calder v. Camp Grove State Bank*, 892 F.2d 629, 631-32 (7th Cir. 1990); E. Farnsworth, Contracts 460. A judge and not a jury should ordinarily answer this threshold question because it often requires going beyond the four corners of the written document and scrutinizing the very extrinsic evidence whose admissibility is at issue. *See* E. Farnsworth, Contracts 456 n.25 ("[I]f there seems to be some circularity in examining the very evidence whose admissibility is at stake in order to determine its admissibility, it may help to keep in mind that this examination is made as a matter of law in order to determine whether the evidence shall go to the trier of fact."). But the district court entrusted the issue of integration to the jury because the CBA did not on its face clearly indicate whether it was intended to incorporate all the terms of the contract. The

jury accordingly heard testimony regarding the oral agreement and concluded that the CBA was not intended to be a complete integration of all the parties' understandings. Because the district court concurred in the jury's verdict that the CBA was not integrated, the parol evidence rule did not apply. Hence the secret side agreement could be introduced to vary or contradict the terms of the written CBA.

We agree that the parties did not intend the written terms of the CBA to embody their entire agreement, for neither the Union nor Jewel denies the existence of an additional oral term to the contract—they only dispute its content. Union officials claim that all they promised was to "sit and discuss" Jewel's competitive position once Cub Foods entered the Chicago market. Jewel executives maintain, on the other hand, that they agreed to "an economic reopener with full reservation of rights conditioned on the entry of Cub Foods into the Chicago market." Because both sides concede that there was an additional oral term to their contract, it necessarily follows that the written terms of the CBA did not represent a full integration. And once the CBA was found not integrated as a matter of law, it was proper for the jury to resolve the additional factual question of the precise terms of the oral promise. The jury ultimately believed Jewel's version of the story, concluding that the parties had orally agreed to reopen the economic terms of the contract in the event Cub Foods penetrated the Chicago market. The oral reopener, therefore, became an enforceable part of the CBA.[1]

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[1] The jury could in theory have reached another conclusion: it could have determined that the CBA represented a *partial* integration, at least as to basic economic terms such as wage rates and the duration of the contract. The jury could have found that the written CBA embodied the entire agreement of the parties as to these fundamental terms. Had the jury so concluded, parol testimony could not have been admitted to contradict the CBA although it might still have been introduced to supplement the CBA with respect to collateral matters.

Mechanical application of the parol evidence rule would thus permit Jewel to introduce testimony regarding the oral side agreement. Yet our analysis of the parol evidence issue cannot proceed in a vacuum, abstracted from the particular setting in which it arose. Because this secret oral reopener undercuts obligations specified in a collective bargaining agreement, it inevitably implicates national labor policy. The critical question before us, then, is whether national labor policy allows enforcement of a clandestine oral side agreement that alters fundamental terms of the written and ratified collective bargaining agreement.

As the Supreme Court has recognized, a collective bargaining agreement is more than just a contract—it erects a system of industrial self-government. *See United Steelworkers*, 363 U.S. at 570. Indeed, certain terms of the collective bargaining agreement are deemed so important that their negotiation is mandated by law. *See Ford Motor Co. v. National Labor Relations Bd.*, 441 U.S. 488 (1979). Yet the laws regulating labor relations would have little substance if the central provisions of the collective compact could be nullified by means of secret side agreements. Union officials and management would then be free quietly to barter away basic guarantees contained in the collective bargaining agreement and relied upon by all union members. In a slightly different context, Judge Easterbrook forcefully emphasized the hazards of oral side agreements that alter the terms of a written contract: "[D]efenses based on . . . oral side agreements . . . are as a class the defenses most likely to breed litigation even when asserted in good faith, and they create manifold oportunities for manipulation by crafty operators." *Central States Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148, 1154 (7th Cir. 1989) (en banc). To avert industrial strife, collective bargaining agreements must be more secure than garden variety contracts. Accordingly, we hold that national labor policy forbids introduction of prior or contemporaneous secret agreements to contradict fundamental terms of a

ratified collective bargaining contract. This secret oral reopener is, therefore, inadmissible and unenforceable as a matter of federal law.

A number of courts have similarly refused on grounds of national labor policy to enforce covert oral side agreements that undermine the written collective bargaining agreement. The seminal case of this genre is *Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945), where the court adapted the parol evidence rule to the labor context to exclude evidence of an oral agreement that contradicted the terms of the written collective bargaining agreement. In that case, an oral side agreement between Gatliff Coal and union officials allowed the company to pay lower wages than those specified in the collective bargaining agreement. Upon suit by employees compensated under the orally agreed-upon rates, rather than those mandated by the written compact, the court held that the National Labor Relations Act clearly precluded the company's reliance upon a prior or contemporaneous oral agreement to modify the terms of the written collective bargaining agreement. *See id.* at 56 n.1.[2]

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[2] Elaborating at length upon the problem of secret side agreements, the *Gatliff Coal* court declared:

> In utilizing collective bargaining agreements to implement a National Labor policy designed to remove certain recognized sources of industrial strife by encouraging friendly adjustment of industrial disputes as to wages, hours of work and other conditions of employment, upon a plane of equality of bargaining power between employers and employees, the National Labor Relations Act, in the public interest, has given such collective bargaining agreements a more secure and stable position in our National economy than that of ordinary common law contracts which may be altered at pleasure by rendering ineffectual and unavailable any collateral agreements between individual members of the collective bargaining group designed to obtain a diminution of the obligations of a particular employer or abridgment of the benefits accruing to particular employees under the collective agreement . . . . To hold otherwise "would reduce the National Labor Relations Act to a mere

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Gatliff Coal was followed in *Local 509, Missouri-Kansas-Nebraska-Oklahoma District Council, Int'l Ladies Garment Workers Union v. Annshire Garment Co.*, 65 L.R.R.M. 2769 (D. Kan. 1967), which prophesied that serious evils would ensue from recognition of a secret side agreement negating the terms of the written collective bargaining contract. Invoking national labor policy, the *Annshire* court declared: "To suppress industrial strife based on this type of controversy, national labor policy requires that the clear and unambiguous requirements of the written collective bargaining agreement be immune from attack founded on a covert side agreement." *Id.* at 2772; *see also N.D.K Corp. and Food and Commercial Workers, Local 1550 AFL-CIO*, 278 N.L.R.B. 151, 122 L.L.R.M. 1253 (1986) ("National labor policy requires that evidence of oral agreements be unavailing to vary the provisions of a written collective-bargaining agreement valid on its face."); *Restaurant Employees, Bartenders and Hotel Service Employees Welfare Fund v. Rhodes*, 90 Wash. 2d 162, 580 P.2d 611, 99 L.L.R.M. 2868 (Wash. 1990) (federal labor law forbids parol testimony to vary the terms of a written collective bargaining agreement).

Ignoring this long line of precedent, however, the district court allowed introduction of the oral reopener to vary the terms of the written CBA. The district court relied upon *Mohr v. Metro East Mfg. Co.*, 711 F.2d 69, to buttress its holding. But our decision is not inconsistent with *Mohr*, which held only that the parol evidence rule does not prevent an individual employer from modifying an industry-wide collective bargaining agreement reached between an employers association and an international union by means of oral agreements with the union local. As the *Mohr* court observed:

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[3] *continued*

futility and leave collective agreements no stronger than the weakest members of the union." Statutes requiring collective bargaining would have little substance if what was made collectively could promptly be unmade individually.

152 F.2d at 56 n.1 (citations omitted).

> The agreement between the association and the international union was deliberately left incomplete in recognition of the diversity of circumstances to which it had to apply, thus allowing individual employers and their local unions to add to the provisions, whether by supplemental written agreements, or oral agreements, or as in this case by both sorts.

Id. at 72-73. Unlike the case at bar, the oral agreement in *Mohr* was not kept hidden from the Union membership. It dealt, moreover, with a purely peripheral matter regarding the terms of employment for schoolboys. Therefore, parol evidence was admissible in *Mohr* to supplement the general terms of the industry-wide collective bargaining agreement and to adapt them to local conditions.

We do not hold that a collective bargaining agreement must be in writing to be enforced. On the contrary, section 8(d) of the National Labor Relations Act does not require collective bargaining agreements to be in writing unless one of the parties requests that they be. *Central States, Southeast and Southwest Areas Pension Fund v. Behnke*, 883 F.2d 454, 459 (6th Cir. 1989); *Gariup v. Brichler Ceiling and Interior Co.*, 77 F.2d 370, 373-74 (7th Cir. 1985); *Eastern Washington Distributing Co.*, 216 N.L.R.B. 1149, 1151 (1975). Section 8(d) thus embodies a considered decision to allow oral collective bargaining agreements when both parties prefer them. *Hamilton Foundry & Machine Co. v. International Molders and Foundry Workers Union*, 193 F.2d 209, 214 (6th Cir. 1952). Therefore, a collective bargaining agreement may be partly or wholly oral as well as partly or wholly in writing, and a written collective bargaining agreement may be orally modified. *Certified Corp. v. Hawaii Teamsters and Allied Workers*, 597 F.2d 1269, 1271-72 (9th Cir. 1979).

The real danger posed by this reopener agreement stems from its secrecy and not simply from its oral character. No one disputes that the oral reopener was, at the behest of Union officials, deliberately concealed from the union

membership. In a precursor to the present litigation, Jewel filed a counterclaim alleging that the Union had breached the oral reopener agreement in violation of section 301. In denying Jewel's counterclaim, Judge Getzendanner perceptively singled out the vice of this secret side agreement:

> [The] oral agreement is inadmissible and unenforceable under the parol evidence rule as a matter of federal law. . . . Jewel's argument that the written contract is not a complete integration is insufficient to avoid application of the parol evidence rule since even a partially integrated written agreement cannot be contradicted by evidence of a prior oral understanding. This rule is particularly important in the context of labor relations, lest union leaders engage in side agreements unknown to the rank and file membership.

United Food & Commercial Workers Union v. Jewel Food Stores, No. 84 C 1648 (N.D. Ill. April 8, 1985) (Getzendanner, J.). The economic reopener strikes at the heart of the CBA: it throws open the most central provisions governing wages and benefits upon the entry of Cub Foods into the Chicago market. Yet Jewel and the Union explicitly collaborated to keep the oral reopener hidden from the rank and file membership despite its paramount significance. Thus Union members who reasonably believed that they were guaranteed a fixed rate of pay for the duration of the CBA unexpectedly found their wages slashed at mid-term. Under these circumstances, enforcement of an oral reopener that was concealed and withheld from ratification by the membership is certainly in derogation of national labor policy.

B. The Ratification Requirement

Our holding does not rest solely upon *Gatliff Coal*, which completely eschewed all evidence of prior or contemporaneous agreements modifying the provisions of a collective bargaining agreement. For the facts of this case acquire their significance from the use of secrecy and the failure

to seek ratification from the Union membership. We emphasize that non-ratification was coupled here with a deliberate policy of secrecy—a factor which is crucial to our analysis. Federal law does not itself require ratification of a collective bargaining agreement. In this case, however, the Union's own constitution and bylaws mandate that collective bargaining agreements be ratified. Jewel understood, moreover, that the oral reopener had not been ratified by the Union membership in violation of the Union constitution. Failure to ratify under circumstances where an employer is aware both of the ratification requirement and of the failure to comply with it may invalidate an employer's claims under the unratified agreement. *See Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747, 756-58 (3d Cir. 1977); *Meyerson v. Contracting Plumbers Ass'n*, 606 F. Supp. 282 (S.D.N.Y. 1985).

Jewel argues, however, that a past practice of non-ratification of contract terms could establish waiver of the ratification requirement. *See Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098, 1113-14 (6th Cir. 1986). In *Kraftco*, the Sixth Circuit suggested in dicta that waiver of the ratification requirement could be imputed from well-entrenched practices and customs amounting to an established history of non-ratification. Yet Jewel has failed to demonstrate any established history of non-ratification of *substantial* terms of the labor contract. It is true that peripheral terms of the contract involving personal days, fatigue mats and the cluster group seniority system were generally viewed as binding even though unratified. But these provisions do not rise to the level of significance of a reopener that abrogates basic wage provisions upon the occurrence of a specified condition. The reopener involved a matter of fundamental importance—it dealt with the central question whether any of the employees in the bargaining unit could rely upon the level of wages ostensibly guaranteed by the CBA for its duration. It is disingenuous to equate such a provision with the terms regarding fatigue mats or the rollback of paid personal days. In fact, the reopen-

ing of labor contracts during their term is deemed so significant that it is expressly forbidden by Section 8(d) of the National Labor Relations Act except when provided by contract. This provision argues strongly against unratified reopeners. *See generally Texaco v. National Labor Relations Bd.*, 722 F.2d 1226 (5th Cir. 1984); *Meyerson*, 606 F. Supp. 282.

We decline Jewel's invitation to infer waiver of the ratification requirement from past instances of non-ratification involving contract terms of such trifling magnitude. To do so would be counter to national labor policy. It would encourage unions to submit every issue—no matter how trivial—to the membership for ratification out of fear of waiver. Failure to ratify routine matters, therefore, should not be deemed a blanket waiver of the ratification requirement as to the essence of a collective bargaining agreement.

In its strenuous efforts to establish a past practice of waiver, Jewel can point to only one meaningful instance of non-ratification. An unratified provision of the 1969 collective bargaining agreement between Jewel and the Union allegedly allowed wages to be reopened and renegotiated upwards in the event that the Teamsters Union attempted to organize the workers. But any resemblance between the 1969 reopener and the 1983 reopener stops short at the surface, for the 1969 provision furthered the interests of *all* parties: Jewel benefited by keeping the Teamsters out of its stores, the Union benefited by retaining its membership and the members benefited by gaining a possible raise in salary. Such a provision, therefore, is hardly analogous to a controversial wage reopener allowing Jewel to cut wages unilaterally in the event that another employer paying lower wages entered the market.

The district court found failure to ratify the reopener immaterial even in the absence of any past practice of non-ratification. Citing *Chrysler Workers Ass'n v. Chrysler Corp.*, 834 F.2d 573, 582 (6th Cir. 1987), the court broadly pronounced that Jewel had a right to rely upon its agreement with the Union whether or not it was ratified

absent clear notice that the Union was acting in bad faith against the interests of its members. *See Merk v. Jewel Food Stores*, No. 85 C 7876, slip op. at 9 (N.D. Ill. April 9, 1990). The district court's interpretation of *Chrysler Workers*, however, is inapposite. For *Chrysler Workers* involved a side letter agreement between a union and a former employer which dealt only with certain workers' transfer rights. Such an agreement is hardly comparable to a provision which could potentially result in the lowering of the wage level of workers in the bargaining unit across the board. Of even greater importance, moreover, is the fact that the side agreement involved in the *Chrysler Workers* case was not kept hidden from the union membership. Notice and an explanation of the side agreement were, on the contrary, readily available to all union members:

> Shortly after the letter agreement the Union put plaintiffs and other "work opportunity employees" who had transferred to the Lima plant on notice of a meeting to be attended by international union representatives in July of 1982 to "explain the agreement and to answer questions." There was no affirmative act of concealment.

834 F.2d at 582. By contrast, in the present case the economic reopener was deliberately concealed from the membership and Jewel participated at least passively in this concealment.

Union officials explicitly enjoined Jewel management to keep the reopener secret. Jewel is hardly an unsophisticated employer. Aware of the secrecy surrounding the oral reopener, it must have drawn the obvious conclusion that the terms of the side agreement would not be submitted for ratification or even disclosed to the Union membership. Jewel now argues that it believed the secrecy was intended solely to keep the reopener hidden from the International Union. But whether concealment was motivated by a desire to keep the side agreement from the membership or from the International is irrelevant: the reopener was in fact kept from the membership

and Jewel was on notice of this fact. Subsequently, when it was submitted to the membership in connection with the present plaintiffs' suit against the Union, this same reopener was overwhelmingly voted down. It would not have been difficult for Jewel to predict that such a provision would have been at least highly controversial and might well have been overwhelmingly defeated by vote of the membership. We need not close our eyes to industrial realities.

Jewel now argues, however, that the reopener may not have been ultimately to the detriment of the membership. Perhaps the oral reopener stood in place of the most favored nations clause initially sought by Jewel, a provision which might have been even more onerous to the membership. Or perhaps Jewel would not have agreed to as high a wage level as it did had it not been able to obtain the oral reopener. But it is not for us to decide whether the reopener would have ultimately benefited or harmed the Union membership. All that is clear is that the reopener was a matter of critical concern that should have been disclosed to the membership and submitted for ratification. Union leaders may actually comprehend the needs of their members better than the members do themselves. This type of paternalism, however, is hardly consonant with the accepted principles of union democracy enshrined in the federal labor laws. Accordingly, we hold as a matter of federal law that Jewel was not entitled to rely upon a reopener that it knew was not ratified, or even disclosed to the union membership, in violation of the Union constitution.[3]

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[3] *McLaughlin & Moran, Inc.*, 299 N.L.R.B. No. 7 (1990), does not hold otherwise. In *McLaughlin*, the union sought to escape a collective bargaining agreement on the grounds that it had failed to follow its own procedures for ratification by allowing casual employees to vote. The National Labor Relations Board concluded, however, that the collective bargaining agreement was binding only because the company had no reason to know or suspect that any mistake had been in the ratification process. "That the [union]

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The dissent concedes that an agreement by an agent without actual or apparent authority is empty under the law. As the dissent points out, union officials lacked actual authority to agree to an unratified reopener and they lacked apparent authority because Jewel knew of the ratification requirement but acquiesced in a deliberate policy of secrecy. The dissent attempts to avoid the logical consequences of its concessions, however, by reiterating Jewel's argument that a past practice of non-ratification of contract terms demonstrated waiver of the ratification requirement. In particular, the dissent focuses upon the unratified 1969 reopener. According to the dissent, the nub of our argument is that "[r]eopeners are OK when they help the employees . . . but not when they help the employer." *Infra* at 34. But the dissent obviously mischaracterizes our holding. Non-ratification of the 1969 reopener is unproblematic not because it might have benefited the membership but rather because it would clearly have been ratified. The 1969 reopener was not a burden but a benefit whose ratification would have gone unquestioned. For surely no one would or could complain of concealment of a benefit. This is tantamount to being pleasantly surprised by a gift.

The 1983 reopener, on the other hand, concealed a burden (a potential wage reduction) from the membership against whom it was later enforced. Purporting to even-handed treatment of both sides, the dissent maintains that

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[3] *continued*

may have mistakenly followed the wrong procedures," the Board wrote, "does not absolve it from being bound by the representations [the union negotiator] made to [the company], *when [the company] had no way of knowing or even suspecting that a mistake may have been made.*" Ignoring this careful language, the dissent maintains that an agreement approved by union officials is binding regardless whether or not it is ratified. But the dissent's reading of *McLaughlin* is far too broad: *McLaughlin* does *not* go so far as to allow a company to rely upon an agreement made in flagrant violation of a union ratification requirement even when the company is aware both of the requirement and that it has been flouted.

secret side agreements should be enforced equally whether they redound to the benefit of the employer or the employee. Despite its seductive symmetry, however, the dissent's argument is substantively flawed. For with respect to information, employers stand in a position radically different from employees. Employers are apprised of every facet of the collective bargaining agreement—oral or written, secret or publicized to all the world. Thus no aspect of the collective bargaining agreement—whether it is beneficial or detrimental—catches the employer by surprise.

The dissent insists for unexplained reasons upon the dubious proposition that labor is a commodity of the same order as coal, a view that is definitively refuted by the law: "The labor of a human being is not a commodity or article of commerce." Section 6 of the Clayton Act, 15 U.S.C. § 17; *see also Transportation-Communication Employees v. Union Pacific R.R.*, 385 U.S. 157, 160-61 (1966) ("A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts."). The dissent also trumpets the need for flexibility in labor relations. Flexibility may be a virtue in collective bargaining agreements but it should hardly extend to surreptitious downward adjustments of basic wages. Such changes, if concealed, are highly destabilizing, producing strikes and lawsuits which the national labor policy does indeed eschew. The dissent protests overmuch about *Gatliff Coal*, which takes the common-sense position that paying wages based upon an oral side agreement (presumably undisclosed to the employees) in the face of a written contract for higher wages violates national labor policy because it obviously promotes industrial unrest and bitter controversy. Disparaging *Gatliff Coal* as old and outmoded, the dissent cites no more recent case on point.[4] The dissent is unable to find any

[4] The dissent cursorily refers to a string of cases which it claims run counter to *Gatliff Coal*. But, read closely, these cases hold

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case which holds *contra* to *Gatliff Coal*. That is probably because the principles of fairness underlying *Gatliff Coal* are still central to the labor law of the land.

C. Punitive Damages

Finally, plaintiffs' request for punitive damages must fail. The district court properly concluded that punitive damages should not be awarded in this suit for breach of a collective bargaining agreement. As the district court cogently reasoned, if punitive damages are not available for breach of the duty of fair representation, *see International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), then they are surely not available for a simple breach of contract. For astronomical damages might threaten the goal of harmonious resolution of labor disputes which is at the core of national labor policy. At the very least, we should not award punitive damages in this case because it involves at worst a simple breach of contract uncomplicated by evidence of fraud or other tortious misconduct. *See Patton v. Mid-Continent Systems, Inc.*, 841 F.2d 742, 750-51 (7th Cir. 1988).

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[4] *continued*

only that parol evidence may be considered to resolve ambiguities or fill in gaps in a written collective bargaining agreement. *E.g.*, *Matuszak v. Torrington Co.*, 927 F.2d 320 (7th Cir. 1991) (can look to course of dealing to determine whether laid-off employee may receive seniority for time of layoff); *Bokunewicz v. Purolator Prod., Inc.*, 907 F.2d 1396 (3rd Cir. 1990) (can look to parol evidence to determine when employees' benefits vested); *Manville Forest Prod., Inc. v. Paperworkers Union*, 831 F.2d 72 (5th Cir. 1987) (can look to past practices and negotiating history to determine whether company was obliged to fill "broke hustler" position if shut-down paper machine were reactivated); *Machinists v. Sargent Indus.*, 522 F.2d 280 (6th Cir. 1975) (can resort to parol evidence to elucidate meaning of term "sound actuarial basis" used in CBA). None of these cases dealt with the problem addressed in *Gatliff Coal* and presented here—whether to enforce a secret agreement that contradicts fundamental terms of a written CBA.

III.

The district court apparently examined each of plaintiffs' arguments in isolation, overlooking their combined significance. One by one, the court addressed the parol evidence rule, the Union's ratification requirement and national labor policy. Taken individually, as the district court did here, none of plaintiffs' arguments may be dispositive. Read together, however, they clearly illuminate the grave dangers posed by a backroom deal that is secretly negotiated between union officials and company management without the knowledge or consent of the union rank and file. The district court's decision is therefore REVERSED and REMANDED for further proceedings consistent with this opinion.

EASTERBROOK, *Circuit Judge*, dissenting. An employer, fearing a rival with a reputation for low wages (more to the point, low prices) demands a most-favored-nations clause, under which it would receive the benefit of any concessions the union makes to the rival. Unions prefer not to make such bargains. A strike looms: the employer will not sign a contract without a most-favored-nations clause, and the union will not sign a contract with one.

At the last minute they agree to replace the contested clause with a reopener. Although the contract is to run for three years, if the dreaded competitor enters the market sooner either side may renew negotiations with the usual privileges: after good faith bargaining to impasse, the employer may implement its final offer, the union may strike, or both. *Electrical Workers Local 47 v. NLRB*, 927 F.2d 635 (D.C. Cir. 1991). A reopener can work in either side's favor depending on economic conditions. It does not modify or contradict any other term of the contract; it is part of the terms, giving each side an option.

The rival entered; the employer exercised the right to reopen; union and employer bargained to impasse, and the employer implemented its final offer. When the dust settled the union retained the fundamental terms of the contract (including wages) and won back pay for its members. But it did not seek back pay for employees who left the firm before that settlement. These employees tried to tax the union with breach of its duty of fair representation but lost. *Merk v. Jewel Companies, Inc.*, 848 F.2d 761 (7th Cir. 1988). So also the ex-employees lost their contract suit against the employer. A jury determined that the deal was as I have described it, that the plaintiffs received their contractual due.

The reason this case went to a jury at all is that the reopener was oral, while the bulk of the pact was written. But as the union conceded that there had been an oral side agreement, disputing only the employer's description of its content, the parol evidence rule did not prevent the jury from determining whose version is cor-

rect. My colleagues agree with the trial judge, 734 F. Supp. 330 (N.D. Ill. 1990), and 1990 U.S. Dist. LEXIS 5486, that the doctrines applied to commercial cases enforce that oral agreement. Had this been a long-term contract for coal with an oral agreement to renegotiate the price if a low-cost strip mine should open, or a contract to build a skyscraper with an oral agreement to renegotiate the number of stories if the real estate market should collapse, the agreement could be enforced.

But not when the commodity is labor, the majority says. If my colleagues thought there was some problem with the feeble enforcement of the parol evidence rule in modern litigation, I would share their concern. The parol evidence rule and the statute of frauds reduce the costs of fabrication, litigation, and error—at the expense of making the bargaining process less flexible and withholding enforcement of some bargains. Most courts today think the costs of strict insistence on written instruments excessive. Whether they are right in believing this is an interesting question. What the majority does, however, is not signal a revival of the writing requirement; it maintains, instead, that labor law is different. What, then, is the source of the difference?

My colleagues point to "national labor policy", which they say mandates that "collective bargaining agreements must be more secure than garden variety contracts." Slip op. at 8. Labor policy may be found in labor statutes. It turns out that the National Labor Relations Act does not forbid oral agreements. Quite the contrary, the Act requires only one sort of agreement to be in writing. Pension plans must be written down, and the writings will be strictly enforced on command of both labor, 29 U.S.C. §186(c)(5)(B), and pension, 29 U.S.C. §1145, laws. See *Central States Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989) (in banc). When Congress singles out one kind of agreement for a strict writing requirement (as it did to protect the interests of the pension plans, which are not present at the bargaining table),

it makes sense to infer that labor and management may decide for themselves how formal the rest of their dealings shall be. If labor policy really emphasized stability (and protection of workers from their own leaders' "backroom deals", slip op. at 20), the NLRA would require the commitment of all agreements to writing, would require leaders to submit them to vote by members, and would require the written pact to be circulated far enough in advance of the vote that it could be digested and intelligently debated. Labor law requires none of these things, as my colleagues concede, slip op. at 11. By any reckoning, ordinary commercial contracts—to which §§ 2-201, 2-202, and 2-209 of the Uniform Commercial Code apply—are more secure against disputes about oral colloquies than are labor agreements governed by §8(d) of the NLRA, 29 U.S.C. §158(d). Labor law emphasizes flexibility, not certainty.

Flexibility is a commodity negotiators value, and not only because it is impossible to write down all of the understandings and practices (even all of the "important" understandings and practices) that make up the terms and conditions of employment. Collective bargaining agreements are relational contracts. They do not settle all important terms; rather they establish a framework within which the parties compose their differences.

It is perverse to say that the contracting process in labor must be *more formal* than the contracting process in shipping or construction or natural resources. You can define how much coal to sell and where to deliver it; you can set the duration of a charter party. Labor agreements govern the ongoing relations among thousands of persons and affect matters not so easy to specify. Rigidity backfires. Competitive conditions and technology change. Labor relations must change too, even over so short a period as three years. Failure to adjust to new developments means failure in product markets (look at the automobile and railroad industries), and when the employer slips in product markets labor takes the fall. If a low-price rival enters and siphons business, a firm bound to pay high

wages will lay off many workers. Layoffs hurt the employees with the shortest tenure—that is, the persons who are plaintiffs in this case. Greater flexibility promotes responses in the marketplace that may benefit both sides.

Ongoing accommodation is a hallmark of labor relations. Representatives of labor and management meet continually to discuss both individual grievances and more general questions. Changes may ensue, with or without written agreements. "[T]he parties to a CBA [collective bargaining agreement] may tacitly acquiesce to an amendment of the agreement through their course of dealing." *Matuszak v. Torrington Co.*, 927 F.2d 320, 324 (7th Cir. 1991). Because labor and management recognize that even this process cannot be comprehensive, they deputize arbitrators to resolve still more issues. Arbitrators sometimes are limited to grievances, but more commonly their powers extend to all interpretive debates. Courts regularly say that arbitrators are not bound by the parol evidence rule, that because collective bargaining agreements are incomplete, and so much of labor relations consists in oral understandings, arbitrators may use these oral exchanges to supplement or even contradict the written terms. E.g., *SEPTA v. Railroad Signalmen*, 882 F.2d 778, 784 (3d Cir. 1989); *Loveless v. Eastern Air Lines*, 681 F.2d 1272, 1279-80 (11th Cir. 1982); *NLRB v. L.B. Priester & Sons, Inc.*, 669 F.2d 355, 365 (5th Cir. 1982); *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union*, 611 F.2d 580 (5th Cir. 1980); *Machinists v. Sargent Industries*, 522 F.2d 280 (6th Cir. 1975); *Tolbert v. Union Carbide Corp.*, 495 F.2d 719, 721 (4th Cir. 1974). If my colleagues are right, these decisions must be wrong.

The Supreme Court has said repeatedly that labor relations require more flexibility than the common law allows—not, as my colleagues hold, more formality. E.g., *Transportation-Communication Employees v. Union Pacific R.R.*, 385 U.S. 157, 160-61 (1966) ("A collective bargaining agreement is not . . . governed by the same old common-law concepts which control such private contracts.

. . . In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements."); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-81 (1960); *McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 273-74 (1958). See also *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 308-09 (1989) (describing "flexibility" as a hallmark of labor relations under both the NLRA and the Railway Labor Act and adjuring courts not to disfavor informal arrangements).

Flexibility entails giving labor and management the option of having a fully integrated agreement, of banning oral side agreements, as well as the option of coming to partially-written, partially-oral understandings. My colleagues concede that this agreement, which lacked an integration clause, did not ban oral understandings. Our question is whether labor law forbids such side agreements even when the parties decide against an integrated writing. A handful of cases say that it does; the majority relies on *Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945), and a smattering of unreviewed decisions by district courts, all more than a generation old. *Gatliff* rests in part on the premise that the NLRA "contemplates that a collective bargaining agreement be in writing", 152 F.2d at 56, which it obtained by misreading *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523-26 (1941). *Heinz* holds that it is an unfair labor practice for the employer, having reached an agreement with the union, to refuse to sign a document embodying its agreement. That labor is entitled to a written memorial of a bargain hardly shows that labor is *forbidden* to reach oral understandings with management. *Gatliff* dealt with a common problem: a member of a multi-employer bargaining unit refused to sign the pact the association reached with the union, pleading that local officials said that it would not have to. Today a belated effort to withdraw from a multi-employer unit would be dealt with as an unfair labor prac-

tice, see *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 (1982), and not as a problem of parol evidence. After the Labor Board resolved the multiemployer unit problem in 1958, *Retail Associates, Inc.*, 120 N.L.R.B. 388 (1958), *Gatliff* vanished without a trace.[1] More recent cases in the Supreme Court (e.g., *Conrail* and *Union Pacific*), in the sixth circuit (e.g., *Sargent*), in our own circuit (e.g., *Matuszak*), and in other circuits take a different approach to contractual formalities. For example, the fifth circuit believes that the parol evidence rule does not apply *at all* in labor law. *Manville Forest Products, Inc. v. Paperworkers Union*, 831 F.2d 72, 75-76 (5th Cir. 1987). Going to the extreme opposite from my colleagues, *Manville* said that "national labor policy" forbids

[1] My colleagues think it significant that I have not found a case disapproving *Gatliff* by name. Guilty as charged. Plea in mitigation: As other courts take no notice of *Gatliff*, there are no citations to collect. The Supreme Court has never cited *Gatliff*. No court of appeals has cited it since 1964, when *Lewis v. Owens*, 338 F.2d 740, 742 (6th Cir. 1964), pointedly declined to rely on it. *Gatliff* has been cited by courts of appeals a total of three times; *Clothing Workers v. NLRB*, 324 F.2d 228, 231 (2d Cir. 1963); *Lewis v. Lowry*, 322 F.2d 453, 456 (4th Cir. 1963) (in banc), and *Owens*. *Lowry*, like *Owens*, cites *Gatliff* without endorsing its conclusion that labor policy bars oral agreements that would be permitted by the parol evidence rule. *Clothing Workers* includes *Gatliff* in a string citation for the proposition established in *Heinz*: that the employer must sign a formal document if the union demands one. *Gatliff*'s conclusion that an employer may not withdraw from a unit after agreement has been reached is unimpeachable, given *Bonanno* and *Retail Associates*. The reason *Gatliff* gave has been abandoned, and the one that replaced it in *Bonanno* and *Retail Associates* does not assist the plaintiffs. A natural person missing for seven years is presumed dead. Justice Holmes remarked that "the reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view." *The Path of the Law*, 10 Harv. L. Rev. 457, 458 (1897), reprinted in *Collected Legal Papers* 167, 169 (1920). *Gatliff* has been missing for seven years plus a generation, which speaks more eloquently than express disapproval.

labor and management to have a fully integrated contract no matter how strongly they prefer the benefits of certainty.[2] See also *Westinghouse Elevators of Puerto Rico, Inc. v. S.I.U. de Puerto Rico*, 583 F.2d 1184 (1st Cir. 1978); cf. *Bokunewicz v. Purolator Products, Inc.*, 907 F.2d 1396, 1401-02 (3d Cir. 1990). I am no more enamored of an approach that dishonors attempts to put everything in writing than I am of an approach that dishonors oral agreements when the parties did not want their writings to be complete. There is a happy middle ground: Parties may choose for themselves.

This sets up the majority's argument that the union *did* choose to exclude oral agreements, by requiring ratification of the pact by the membership. Technically, the argument is that the union's negotiators lacked *actual* authority to agree to a reopener, because the union's constitution requires ratification, and they lacked *apparent* authority because Jewel not only knew about this requirement but also understood that the union's negotiating team was not

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[2] The majority insists, slip op. at 18-19 n.4, that cases such as *Manville* "hold only that parol evidence may be considered to resolve ambiguities or fill-in gaps in a written collective bargaining agreement." This is the argument from triviality. More to come in the text below. Two observations here: First, none of the other courts of appeals believes that this matters. Second, I am baffled by the refrain that a reopener is specially grave because it "conflicts" with "fundamental" provisions of the agreement. With what provision does it conflict? If the reopener had been written down we would not say that the contract had an internal contradiction. A reopener is an option to bargain in mid-term, and options do not "conflict" with the provisions that control in the event they are not exercised. At all events, what I find significant about these cases is not that their subjects are grave or trivial, but that these courts hold that oral agreements trump written ones. The writing in *Manville* contained a zipper clause—language specifying that the pact was fully integrated and waiving all right to bargain during the term of the agreement. The court of appeals held that such a clause may be ignored. That is why these cases represent the polar opposite to the majority's position. They say that the parties *cannot* achieve an integrated collective bargaining agreement.

going to tell the membership about the reopener. Notice that this argument does not supply any reason to differentiate labor law from other bodies of law. "Agreement" by an agent lacking both actual and apparent authority is empty in all corners of the law. Claims about how labor law is special melt away if, in the end, this case is about the negotiators' lack of authority.

Four issues precede the question whether defects in the ratification process prevent enforcement of the reopener. First: do provisions of a union's constitution affect the validity of labor agreements? The National Labor Relations Board thinks not. *McLaughlin & Moran, Inc.*, 299 N.L.R.B. No. 7 (1990), holds that once the responsible officials of a union report to the firm that the union has approved an agreement, it is binding—even if the union did not follow prescribed procedures. The Board wrote that "it is none of the Employer's business how (or even whether) the [Union] obtains the employees' approval" of the agreement, and that "it is for the union, and not the employer, to construe the meaning of the union's internal requirements for ratification." Any other approach, the Board thought, would make it "difficult, if not impossible, for the parties to a collective-bargaining agreement to arrive at a final settlement without the fear of being forced into protracted litigation regarding the union's compliance with its own procedures, clearly a collateral issue. The encouragement of such industrial instability could not have been with the intendment of the Act." *McLaughlin & Moran* reiterates a doctrine the Board has applied for decades. E.g., *NLRB v. M&M Oldsmobile, Inc.*, 377 F.2d 712 (2d Cir. 1967); *Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 211-12 (6th Cir. 1967); *NLRB v. Darlington Veneer Co.*, 236 F.2d 85, 88 (4th Cir. 1956). *Darlington* holds that the union's ratification procedures affect the validity of the agreement only to the extent the employer accepts them; otherwise labor law makes the word of the negotiators the union's bond. To put this differently: Labor's negotiators *have* authority, as a matter of federal law, no matter what the

union's internal procedures may be. This principle is conclusive against plaintiffs. I cannot find any contrary holding. Yet my colleagues, who extoll the importance of stability, also promote the sort of litigation regarding internal union procedures that, the Board and other circuits believe, undermines stability.

Second: if contrary to *McLaughlin & Moran* the union's procedures matter, did Jewel know that the union's rules required ratification term-by-term, and that the local's officers would keep one term under wraps? Unless Jewel knew, the union's officers acted with apparent authority. Jewel denies having this knowledge, and the jury's verdict hardly resolves this question against it. The majority distinguishes *McLaughlin & Moran* because that employer lacked knowledge of union's internal rules while ignoring Jewel's protest that it was in the same position. At all events this factor plays no role in the Board's analysis or that of other circuits.[3] Third: does a defect in ratification apply exclusively to the oral portions of the

[3] In *Houchens*, for example, the union initially told the employer that "any contract proposal or recommendation would be subject to approval by the employees." 375 F.2d at 209. When the negotiators reached agreement, the company said it would await the employees' approval. At this point the union's negotiators insisted that the company implement the agreement without the employees' approval; the company balked; the Board found that the company had committed an unfair labor practice; the court of appeals enforced the order, explaining: "The purpose of collective bargaining is to fix wages, hours and conditions of work by a trade agreement between the employer and his employees. . . . This can be done satisfactorily only if a bargaining agent is selected to represent all the employees with full power to speak in their behalf. The purpose of the statute would be largely frustrated if the results of bargaining must be submitted to a vote of the employees, with all of the misunderstandings and cross currents that would inevitably arise in an election of that sort." 375 F.2d at 212, quoting from *Darlington Veneer*, 236 F.2d at 88. The reasons given in *Houchens* and *Darlington Veneer* sound remarkably like the reasons in my colleagues' opinion—except that the outcomes are diametrically opposed.

agreement? Why should Jewel be bound by the provisions favorable to the union (those the union's officers told the members about) but be unable to avail itself of the provisions favorable to itself? Ratification, one would think, is an all-or-nothing business. Fourth: why is Jewel, as opposed to the union, answerable to persons injured by defects in the ratification process? As the majority paints this picture, the union's officers set out to hoodwink the members by keeping under wraps a reopener agreement that the members would oppose. Such a wrong sounds distinctly like a breach of the duty of fair representation. Yet three years ago this court held that these plaintiffs may not recover from this union on such a theory. 848 F.2d 761. Suppose the majority could surmount these obstacles. More remain.

Nothing in the union's constitution requires the officers to submit written documents to the members for perusal before a vote. This local does not circulate agreements to its members. Once the negotiating team reaches an agreement with management, the officers call a meeting at which they recount the terms they think significant. They are free under both the international union's constitution and their own practices to trumpet the features they deem salient while overlooking concessions to management. Of course members may ask questions during debate, but there is no indication in this record that anyone asked whether the agreement included a reopener, let alone that the officers answered falsely. Treating a ratification requirement as if it were a writing requirement is a serious misstep.

Practice illuminates how the union understood the meaning of ratification. The jury found—as the parties agree—that union and management routinely left matters including the number of personal days off and details of the seniority system to oral agreements that were not described to the members before ratification. Judge Posner asked the jury to decide whether under the parties' practice an agreement had to be written in order to be valid.

The jury determined that writing was unnecessary. My colleagues deem details such as seniority and days off to be trivial—questionable as an original matter, but no ground for upsetting the jury's contrary decision on the same point.

Especially not when one of the examples presented to the jury was—another oral reopener agreement! The trial judge wrote:

> Merk's argument from triviality is contradicted by the evidence of a reopener agreed to in 1969. That agreement was premised upon a raid, not by Cub Food, but by the Teamsters, and allowed the contract to be reopened to renegotiate *higher* wages. If the jury concluded that there was an agreement to reopen the contract in 1969, as it could have, and that that agreement was not ratified, then the agreement in this case was no more significant to Jewel than the 1969 reopener was to the Union, and could be valid even if unratified.

1990 U.S. Dist. LEXIS 5486 at *13-14 (emphasis in original). Given the protection the seventh amendment accords to jury verdicts, you would think this evidence conclusive. But no; the majority says that the 1969 reopener is different because "the 1969 provision furthered the interests of *all* parties: Jewel benefited by keeping the Teamsters out of its stores, the Union benefited by retaining its membership and the members benefited by gaining a possible raise in salary." Slip op. at 14 (emphasis in original). This sounds more like a lawyer's closing argument to a jury than like a reason why the jury's verdict must be set aside. After page 7 of the majority's opinion (where it concludes that the jury could enforce the oral reopener under the rules usually applied in civil litigation), you do not encounter the word "jury" again. My colleagues make *de novo* findings on all factual disputes and draw their own inferences.

Disposing of a raft of oral agreements on the ground that they are trivial, and of a vital oral agreement on the

ground that it could propel wages upward, supports a decision for these plaintiffs only at substantial damage to other values. Recall that the majority started from the premise that "collective bargaining agreements must be more secure than garden variety contracts." Slip op. at 8. How is the agreement "more secure" if labor and management cannot know whether it is binding until they obtain the views of three appellate judges on how "important" it is? Importance lies in the eye of the beholder (I think that seniority provisions do not belong in the "trivial" class to which my colleagues consign them). Worse, the majority makes it clear that enforceability depends on who wins and who loses *ex post*. Negotiators need to know *while they are dickering* which agreements will be enforced and which not; people at the bargaining table in January 1983 cannot wait for a court in September 1991 to tell them which deals are sufficiently unimportant, and which turn out sufficiently favorable to the workers, to be enforced.

Consider again the position of the parties when Jewel was insisting on the most-favored-nations clause. What options had they?

- They could have reached impasse, followed by Jewel's implementation of its final offer (including the most-favored-nations clause), which might have precipitated a strike. All workers either would have been subject to the most-favored-nations clause (if they continued to work on Jewel's terms) or would have lost wages during the struggle. Jewel might or might not have been able to "break" the union during a strike.
- They could have signed an agreement with a most-favored-nations clause. The membership might have ratified this (with results less favorable to the employees than what actually happened) or might have rejected it (with the same results as impasse).
- They could have signed an agreement with a written reopener. The membership might have ratified

this (with results less favorable to the employees than what actually occurred—recall that uncertain enforceability of the oral reopener led Jewel to compromise with the union) or might have rejected it (with the same results as impasse).

- They could have signed a one-year rather than a three-year agreement, with effects fundamentally the same as a three-year agreement plus a reopener.
- They could have signed a three-year agreement without a reopener, but with lower salaries and benefits to compensate Jewel for the risk it was taking.
- They could have signed precisely the agreement they did, without a reopener. After the low-price rival entered, Jewel could have laid off workers on account of lower sales.

None of these is a clear winner for the employees, whose pickle is attributable not to faithless agents but to impending competition in the market. All options are potentially inferior for the employees to the solution the union negotiated. Bargains usually yield benefits for both sides. The union's agents believed that this deal with Jewel was the best one available. It was at *the union's* behest, not Jewel's, that the reopener was oral rather than written. My colleagues concede all this but reply: "[I]t is not for us to decide whether the reopener would have ultimately benefited or harmed the Union membership." Slip op. at 16. This is the wrong question, for we are not trying to determine who won or lost, but whether the 1983 reopener is sufficiently like the 1969 reopener that a jury could conclude that the parties' practice did not require its presentation to the membership in writing. That question is indeed "not for us"; it is for the jury, and we do not learn why the jury could not find the two reopeners sufficiently similar. Suppose, though, that the distribution of benefits were the right question, and judges the right persons to answer it. Why may we not "decide whether the reopener would have ultimately benefited or harmed the union membership" when, two pages earlier, we make

exactly that decision about the 1969 reopener? Either we may inquire into this subject or we may not. If we may, we should examine both reopeners; if we may not, neither. Finding benefits for the union in the 1969 reopener while disclaiming any power to search for benefits in the 1983 reopener is tellingly inconsistent.

Neither the parol evidence rule nor the union's ratification requirement vitiates an oral reopener agreement. My colleagues fuse two unsatisfactory theories: "Taken individually . . . none of plaintiffs' arguments may be dispositive. Read together, however, they clearly illuminate the grave dangers posed by a backroom deal that is secretly negotiated between union officials and company management without the knowledge or consent of the union rank and file." Slip op. at 20. Here the majority announces that the 1983 reopener was *bad* for the employees—despite its disclaimer at page 16 of authority to inquire into this question. This is special pleading. Reopeners are OK when they help the employees (page 14) but not when they help the employer (page 20). Such a disposition bears no resemblance to a rule of law. It is a thumb on the scales of justice.

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APPENDIX C

United States District Court
Northern District of Illinois
Eastern Division

KELLY MERK, JOSEPH STASZEWSKI, VICKIE MENAGH, DONNA McCORMICK, DAVID THERKIELD, JOHN MALONE, MARLENE WAGNER, MICHAEL DEMARE, WAYNE VOLKER, ELEANORE COLLINS, ANDREW KACHIK and PATRICIA TODD, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JEWEL FOOD STORES DIVISION, JEWEL COMPANIES, INC., AMERICAN STORES COMPANY, INC., and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 881, Chartered by UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AFL-CIO and CLC,

Defendants.

NO. 85 C 7876

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

This case presents difficult labor law issues which appear to be of first impression. The plaintiffs are part of a putative class of former supermarket employees of defendant Jewel Food Stores ("Jewel"). Their three-count complaint under § 301(a)

of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a),[1] while pleading alternative and inconsistent claims for relief, seeks one remedy—payment of back wages which Jewel allegedly owes plaintiffs under a collective bargaining agreement. Counts II and III are against Jewel and the defendant Union respectively, and together comprise the familiar "hybrid" suit. These counts rest on the existence and breach of a duty of fair representation owed to plaintiffs by the Union. Count I is a direct § 301 claim against Jewel only; it rests on the alternative theory that the Union owed no duty of fair representation to these former employees. The Union has moved for summary judgment on Count III, arguing among other things that it owed no duty to plaintiffs. For the reasons stated below, we agree with the Union and must necessarily dismiss the entire hybrid part of the suit, that is, both Counts II and III. We also have before us Jewel's motion to dismiss Count I, which argues that the direct suit is barred by the six-month statute of limitations set forth in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281 (1983). For the reasons stated below that motion is denied.

I.

The following facts appear to be undisputed. On October 20, 1983, the Union and Jewel entered into a three-year collective bargaining agreement which was effective retroactive to September 19, 1982, and ran to June 15, 1985. Jewel runs about 180 supermarkets in and near Chicago employing some

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[1] That section reads:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

16,000 workers represented by the Union. In January 1984 the Union and Jewel started haggling over a modification of the agreement. Jewel says it believes that the Union had agreed orally in 1982 to reopen the contract for negotiation when the discount "Cub Food Stores" chain was to begin operations. Jewel says that under this oral "reopener" agreement it had the right to unilaterally implement any final offer it made, if the "reopened" negotiations reached impasse. The Union says it made no such agreement, but agreed to meet with Jewel in January 1984 to discuss a proposal by Jewel to cut wages and benefits.

These negotiations got nowhere, and on February 26, 1984, in accordance with what it called its "final offer at impasse," Jewel unilaterally cut wages and benefits below levels specified in the 1982-85 Agreement. The wage cuts were as high as $1.25 per hour, and vacation and personal day benefits were reduced as well. The Union demanded arbitration;[2] Jewel refused and so the Union sued Jewel to compel arbitration. *United Food & Commercial Workers Union, Local 881 v. Jewel Food Stores Division, Jewel Companies, Inc.*, No. 84 C 1648 (N.D. Ill.). The Union also lodged an unfair labor practice charge with the National Labor Relations Board ("NLRB").[3]

In December 1984, the NLRB urged Jewel and the Union to try to negotiate a settlement. The parties met and did not agree. However, the Union submitted Jewel's offer to the rank

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[2] Article IX of the Collective Bargaining Agreement contains the grievance and arbitration clauses the parties agreed to. Section 9.2 sets forth a three-step grievance procedure which appears largely informal. Section 9.3 allows either party to demand binding arbitration if the grievance procedure fails.

[3] On March 13, 1984, the NLRB's Regional Director dismissed the unfair labor practice charge. The Union appealed to the Board's General Counsel, who on September 7, 1984, sustained the appeal and instructed the Regional Director to issue a complaint. The Director did so, and a hearing was scheduled for June 24, 1985, before an Administrative Law Judge. Because of the parties' settlement, this hearing never took place.

and file, who followed the Union's recommendation to reject the offer. Negotiations continued into the spring.

On April 9, 1985, the District Court granted the Union's motion for summary judgment and ordered Jewel to arbitrate. Jewel filed a notice of appeal. Before anything came of the court proceedings, however, the Union and Jewel began more intense and fruitful negotiations. In light of the imminent expiration of the Agreement on June 15, 1985, they combined negotiations over the wage and benefit cut with talks over a new collective bargaining agreement. After a few meetings, Jewel proposed a settlement on May 19, 1985, which would restore most of the wages and benefits to their previous level and also would provide full retroactive pay for wages lost because of the cuts. However, this latter offer extended only to employees *then* on the payroll. The Union submitted the proposal to the membership and recommended acceptance. On June 21, 1985, more than 80% of current employees voted to ratify the new contract and the settlement agreement. As a result, the parties dismissed the Court suit and asked the NLRB to drop its proceedings, which it did.

The plaintiffs are part of a putative class, containing perhaps as many as 2,000 members, of former Jewel employees who were not part of the above settlement. The class includes employees who retired, who quit or who were fired at various points during the fifteen months of the protracted battle. That the class should be so large is not surprising, since turnover is, we presume, normally high in the supermarket industry. Because the settlement included only employees of Jewel as of June 21, 1985, plaintiffs received no retroactive pay for the time they worked during the dispute at the reduced salary. Since they were former Jewel employees and ex-members of the Union, they could not and did not vote on the June 21, 1985 settlement; nor could they wield political power within the Union. They were not notified of the proposed resolution and, specifically, were not told that the resolution would not include them. They must have learned about it somehow,

though, because they filed this suit on September 10, 1985, less than three months following the settlement.

Counts II and III form a traditional "hybrid" suit in the mold cast by *Hines v. Anchor Motor Freight*, 424 U.S. 554, 96 S.Ct. 1048 (1976) and *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967). Count II alleges that Jewel breached the 1982-85 Agreement by cutting plaintiffs' wages; Count III alleges that the Union breached its duty of representing plaintiffs fairly when it reached a settlement which left them high and dry. The twist in this case, though, is that plaintiffs were former employees when the settlement was reached. They claim, in the alternative, and the Union agrees, that the Union owed no duty to these former members. To protect themselves, plaintiffs amended their original complaint to add an alternative theory in what is now Count I, a direct suit under § 301 against Jewel only.

The first issue is whether the Union owed the plaintiffs a duty of fair representation after they left Jewel. While the Union and the plaintiffs agree that no continuing duty existed, we still must decide the question, since Jewel claims that the duty existed. All parties apparently agree about the legal and practical consequences of our decision on this issue. If Jewel is right that the duty existed, then plaintiffs are limited to their hybrid suit in Counts II and III, and we must grant Jewel's motion to dismiss the direct suit, Count I. This result would favor Jewel and hurt the ex-employees, since to recover they would have to carry the substantial burden of showing in Counts II and III that the Union breached its duty of fair representation. However, if the plaintiffs and the Union are right that the duty vanished when plaintiffs did, then plaintiffs will proceed on Count I only. To recover the plaintiffs would need only show that Jewel breached the contract; with the Union out of and irrelevant to their claim, their task would be lighter and Jewel's exposure greater.

This latter result, which we reach below, raises a second issue. We must decide whether the six-month statute of limitations of § 10(b) of the NLRA applies to the direct suit. We will take up the two issues in order below.

II.

The duty of fair representation is a creature of the judiciary, created as a necessary complement to the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* The duty exists because the NLRA makes certified labor unions the exclusive bargaining representative of all employees in the bargaining unit. *See Frandsen v. Brotherhood of Railway, Airline and Steamship Clerks*, 782 F.2d 674, 678-79 (7th Cir. 1986). Since the policy of exclusivity strips employees of normal methods of redress, for their protection, the employees' exclusive representative, the Union, necessarily has the duty "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909 (1967). However, this duty of fair representation extends no further than the Union's authority under § 9(a) of the NLRA, 29 U.S.C. § 159(a), to act as the exclusive representative of the bargaining unit. *See, e.g., Freeman v. Local Union No. 135, Chauffeurs, Teamsters, Warehousemen and Helpers*, 764 F.2d 1316, 1320-21 (7th Cir. 1984). Thus, if the Union is not the exclusive representative of an employee, it has no corresponding duty to represent that employee fairly or at all. *See id.* at 1321.

The Union's authority to be exclusive representative is created and defined by the NLRA, and this authority exists only if a majority of "employees" in a "unit appropriate" for collective bargaining have elected the Union to be their exclusive representative. *See* § 9(a), 29 U.S.C. § 159(a). The Act defines "employee" in § 2(3), 29 U.S.C. § 152(3) as follows:

> The term "employee" shall include any employee, and shall not be limited to the employees of a

> particular employer, unless this chapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . .

The employer has a duty to bargain only with the Union representing "his employees" about wages, hours and the terms and conditions of employment. *See* 29 U.S.C. § 158(a)(5), § 158(d).

The plaintiffs and the Union make a simple and persuasive argument based on the above standards and definitions. When plaintiffs left Jewel, they were not "employees" of Jewel any longer, not "his employees," but ex-employees. Moreover, they were ex-members of the bargaining unit. They no longer paid dues and exercised no power within the Union. Not only would it defy common sense to make the Union exclusive representative of departed employees, it would be unfair to the ex-employees and the Union to do so. If the duty of fair representation lingered after the plaintiffs left Jewel, they would have been subject to the Union's exclusive representation but have had *no* control over their representatives. Unlike current employees who can vote against proposed contracts they do not like, vote against Union officers they do not like or try to decertify the Union altogether, the ex-employees would be stuck with a representative who is not beholden, and therefore unresponsive, to them.[4] If the duty existed, the Union would

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[4] While this whole line of argument might appear circular, it is not. In the argument, we have assumed that the ex-employees have lost their right to vote on contracts, for union officers and so on. Such an assumption (which Jewel nowhere disputes) implies that the ex-employees are no longer Union members, which is exactly the conclusion we are seeking to determine. In other words, one might say it is circular to prove that there is no duty of fair

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be forced to deal with an intolerable conflict of interest between its simultaneous duty to current and ex-employees. It would inevitably sacrifice the interest of ex-employees in order to satisfy current employees, who wield present and future power in the Union. To hold that the Union had a duty to continue representing plaintiffs would be tantamount to holding, that it had a duty to achieve the impossible.[5]

(Continued)

[4] representation by asuming that ex-employees are not Union members since that essentially assumes the conclusion. One might instead argue that plaintiffs *did* have the right to vote and participate in Union affairs, but no one knew it, and so they were unlawfully deprived of a chance to participate in the ratification of the contract.

But we have not improperly assumed our conclusion. As our discussion below of the *Allied Chemical* case makes clear, once they left these ex-employees could not properly remain part of the collective bargaining unit. Indeed, Jewel is not in fact claiming *both* that the Union owed a duty of fair representation to plaintiffs *and* that the plaintiffs were still Union members with a right to participate in Union affairs. Indeed, if Jewel were so arguing, there probably would have been a breach of the duty, since plaintiffs were not notified of or given a chance to vote on the June 1985 settlement. Instead, although Jewel does not say so, Jewel appears to be arguing implicitly that a residual duty of fair representation lingered as to *ex*-members of the Union, who had no corresponding right to participate in a settlement which left them high and dry. Jewel therefore appears to be arguing the plaintiffs were second-class Union members, bound to accept the consequences of the Union's exclusive representation but stripped of normal participatory rights accorded active employees. Jewel cannot have it both ways. If the duty existed, then plaintiffs were improperly denied the right to take part in the process of ratifying that settlement. If the plaintiffs were not Union members, then a direct rather than hybrid suit is warranted.

[5] The Union's brief in support of its motion for summary judgment, at 11, illustrates that plaintiffs would inevitably be sacrificed if they remained part of the unit and that the Union could not accommodate both factions:

> Even if it may be said that some lingering duty of fair representation remains in the case of former employees,

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None of the parties cited any cases on point. However, the plaintiffs did cite a few cases which are analogous to this case. Most important is *Allied Chemical & Alkali Workers of Americal, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383 (1971), where the Court held that "retirees" are not "employees" as defined in § 2(3) of the NLRA. The Court also held that the retirees "were not and could not be 'employees' included in the bargaining unit." 404 U.S. at 172, 92 S.Ct. at 394. The Court reasoned that the NLRA's scheme requires that a bargaining unit include only employees with mutual interests in the terms and conditions of employment. "Such a mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees from being submerged in an overly large unit." *Id.* at 172-73, 92 S.Ct. at 394. The Court emphasized that the inclusion of retirees with current employees in one bargaining unit creates a serious conflict of interest rendering such a unit unworkable: the retirees are interested primarily or exclusively in pension-related issues, and *not* in the full range of issues of interest to current employees, such as wage rates,

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> [8] it must be obvious that the Union's paramount duty is to the working membership and not to those who terminated their employment. In all its actions the welfare of the current membership must be the Union's controlling consideration. In achieving for the current membership a new contract, the Union discharged its primary and paramount responsibility. Indeed, its responsibility to the current membership so greatly outweighs any responsibility it might have to former employees that the Union was under an affirmative duty to present the settlement proposal to the membership even if it did not favor the proposal. A breach of the duty of fair representation could very well have occurred if Local 881 had refused to present Jewel's proposal to the membership for its acceptance simply because the retroactive pay portion of the proposal did not apply to former employees.

hours, working conditions, etc. With such a narrow interest at odds with other interests, retirees would "create the potential for severe internal conflicts that would impair the unit's ability to function and would disrupt the processes of collective bargaining." *Id.* In addition, there is the great danger that the Union would favor active employees over retirees. *Id.*

The retirees and other former employees in this case are analogous to the retirees in *Allied Chemical*. Whether or not they remained "employees" under § 2(3) of the NLRA, they were no more proper members of the bargaining unit once they left Jewel than were the retirees in *Allied*. The potential conflict of interest in such a situation is great, and, in fact, the record suggests that fears of a conflict of interest proved well-founded in this case.[6] Once they left, the plaintiffs had *one* narrow interest—recovering lost wages. The employees left behind had a much broader range of interests, including obtaining good future wages and working conditions, as well as securing future peace and stability in the form of a new collective bargaining agreement. The current employees had everything to gain and nothing to lose by cutting plaintiffs loose without a remedy. In leaving plaintiffs out of the agreement they gave up nothing of economic value to themselves, but gave Jewel an economic plum. Because Jewel apparently took a hard line as to plaintiffs, current employees could not have helped

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[6] The Union argues repeatedly in its briefs that its obligations to active employees gave it no choice but to throw plaintiffs overboard. This happened despite the apparent fact that Union President Ron Powell told Union members that those who left the membership would be protected. But Union leaders testified in their depositions that when push came to shove current, not former employees, were their "primary concern," and that they "bargained away a claim of people who had left our membership in favor of what we thought was a better offer for people who were part of our membership." Deposition of Thomas Walsh at 63. It appears that the Union tried initially to get the back pay for plaintiffs, but "bargained them away" when Jewel took a hard line as to plaintiffs in the final stages of negotiation.

plaintiffs without hurting their own position. This is a classic case of conflict of interest. If plaintiffs indeed remained part of the bargaining unit, they were nothing but a bargaining chip and helpless to prevent their former brothers and sisters from reluctantly tossing them onto the bargaining table.

Both of the factors *Allied Chemical* highlighted as important to a proper bargaining unit—coherence necessary for efficient bargaining and the lack of a submerged, distinct minority group—are relevant here. The plaintiffs were not and could not have been involved in the collective bargaining for a new contract, yet their sole interest would have become enmeshed in that process had they remained part of the unit. The parties very sensibly collapsed the negotiations over the wage cut with those over a new agreement. But plaintiffs could only have hindered that bargaining process if the Union had to account for and stand behind their interests. That is precisely why the Union gave up on plaintiffs' claims. *See* nn. 5 & 6 above. Moreover, our above discussion makes clear that if plaintiffs were indeed lingering members of the Union for the one purpose of their wage claim, they were indeed an isolated and submerged minority sect. The rationale of *Allied Chemical* argues against this result, and Jewel does not adequately deal with this rationale in its briefs. Following *Allied Chemical*, then, we hold that the plaintiffs were no longer proper members of the bargaining unit when they left Jewel.[7] They were like any other worker who quits a company—an ex-employee and ex-

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[7] A few other cases support this result as well. *See* Auto Workers v. Yard-Man, Inc., 716 F.2d 1476, 1484-85 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) (Union owes no duty to retirees and retirees may resolve disputes over vested benefits directly with employer); Anderson v. Alpha Portland Industries, Inc., 752 F.2d 1293, 1296-1300 (8th Cir. 1985) *(en banc)* (retirees need not exhaust grievance or arbitration procedures for dispute over vested contractual benefits since they are outside of the the collective bargaining relationship), *cert. denied*, 105 S.Ct. 2329 (1985).

Union member. As we have seen, it would have been unworkable to define them as lame duck members of the unit for the sole and limited purpose of waiting for a settlement. It follows from this that the Union owed plaintiffs no duty of fair representation.

Jewel argues that the analysis above overlooks a crucial distinction between the retirees of *Allied Chemical* and the retirees and other former employees of this case. There, as in other cases cited above in n.7, the employer allegedly harmed the retirees *after* they had already severed their employment by retiring. In contrast, here all the plaintiffs were by definition active Union members under the Union's yoke, when Jewel cut their wages. When this happened the Union protested on plaintiff's behalf and sued to compel arbitration. Jewel essentially argues that once properly subject to the Union's efforts, plaintiffs were bound to the results of this process no matter how long it took and what changed in the meantime. Jewel relies on an analogy to the common situation where a Union must represent a discharged employee to try to get him or her reinstated, even though such an employee no longer works for the employer or pays Union dues while waiting for the outcome of the grievance.

Jewel's analogy suffers from several flaws. First, and most importantly, Jewel dances around the serious and inherent conflict of interest implicated in this case. In the typical case of one or a few discharged employees, there are simply no profound, inevitable conflicts, although some rather minor ones may sometimes appear. In this respect, the Union's reliance on *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1475 (7th Cir. 1985) is misplaced.[8] It is one thing to say that the Union owes a

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[8] *D'Amato* involved the Union's duty to a probationary employee, who is not at all like a retiree or like plaintiffs. The Court noted that a minor conflict of interest arises whenever a union represents a discharged employee. Some more junior employee could

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continuing duty to one or a few employees unjustly fired. Fullfillment of such a duty works no meaningful harm on other employees in the bargaining unit. The only ones harmed, if at all, are those with less seniority, and that harm is slight. *See* n.8 above. It is quite different to leap to a conclusion that the Union must, or even *can*, continue to represent adequately a class of up to two thousand former employees, *all* of whose narrow interests are diametrically opposed to those of *every* current employee. As we explained above, that would be like giving plaintiffs' two enemies the chance to play with plaintiffs' fate. In sum, while the Union can feasibly represent both the hypothetical discharged employees and those who remain, it could not balance the conflict between plaintiffs and Jewel's current employees.

Second, the duty to represent the discharged employee is clearly grounded in the NLRA. Such employees plainly fall within the definition of "employee" in § 2(3), which includes "any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice." No one disputes that Congress intended that a vital function of the Union would be to protect "employees" fired in breach of a collective bargaining agreement or in violation of the NLRA. But plaintiffs do not fall so plainly within the definition of employee, and, unlike the case with discharged employees, we have no clear indication of congressional intent that a Union must continue to represent ex-employees like plaintiffs.

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[8] theoretically oppose reinstatement because that would harm his or her relative seniority position. That conflict does not mean the union cannot practically discharge its duty to the discharged employee, nor does it excuse him or her from failing to exhaust grievance procedures. 760 F.2d at 1489. The serious and actual conflicts in this case dwarf the abstract and "nascent conflict" mentioned in *D'Amato*. *Id.*

Jewel's analogy also fails for a third, related reason. In the case of the discharged employee, the employee's unwelcome new status as "ex-employee" results from the employer's unlawful act of firing him or her. That is, the *employer* makes the employee an erstwhile employee; the breach of contract or unfair labor practice confers the new status. The ensuing grievance centers around the employee's status: will she be *un*employed or *re*-employed? In sum, the wrong ruptures and the remedy repairs the employment relationship. Because the existence of this relationship is the very issue in dispute and, indeed, lies at the intersection of the collective bargaining and employment relationships, the employer cannot conclusively make the employee an ex-employee and ex-member of the Union simply by "terminating" him or her. The employment status remains unresolved until the dispute is resolved. In contrast, the dispute in this case does not involve plaintiffs' status as "employees" of Jewel or as "members" of the Union. Win or lose, they are and will remain *former* employees with no continuing ties to Jewel. Because plaintiffs' employment status is already long resolved, Jewel incorrectly equates them with discharged employees seeking reinstatement. Indeed, this distinction between former employees who do not want to return and discharged ones wanting their jobs back partly explains the deep conflict of interest detailed earlier. The interests of fired employees generally harmonize with those of current employees, and coincide if they get their remedy. Their long-term interests are very much in line, and thus the Union must represent discharged employees unless and until they lose their grievance. But in seeking their remedy plaintiffs have aligned themselves against the interests of *all* current employees. They seek only one thing and share no long-term interest with current employees. They simply do not properly belong in the bargaining unit.

Jewel also argues that plaintiffs' argument runs afoul of the NLRA's fundamental policy of exclusive representation. Like the previous argument, this contention sidesteps the con-

flicts of interest in this case. As *Allied Chemical* shows, "exclusive representation" does not mean "all-inclusive exclusive representation." Rather, only "appropriate" units may be certified. Our result is consistent with the policy of exclusive representation as it defines a unit for which exclusive representation can work appropriately. We have frustrated the NLRA's policy no more than *Allied Chemical* did.

We must emphasize the narrowness of our holding that the Union owed no duty of fair representation to plaintiffs when the settlement was reached. It depends *both* on plaintiffs' status as ex-employees of Jewel *and* on the serious conflict between their narrow interest and the interest of other employees.* Neither side cited, and we did not find, any case like this one, and given the rare circumstances, we think Jewel cries wolf when it laments that "[a]cceptance of Plaintiffs' position in this regard would effectively preclude management from *ever* relying on a Union resolution of a grievance for *anyone* that was not currently employed. Management would be deprived of the benefit of its contractual bargain, and the collective bargaining relationship would be seriously undermined." (Emphasis added.) Our holding carries no such broad ramifications. As we have described, our reasoning does not apply to employees fired in violation of a collective bargaining agreement. In any event, Jewel has not shown that it "relied" on Union resolution of the grievance *on behalf of* plaintiffs. The evidence suggests that Jewel insisted that plaintiffs be cut loose. The Union was not legally plaintiffs' exclusive agent any longer, and it appears that the Union reluctantly abandoned plaintiffs at Jewel's insistence. If Jewel "relied" on anything, we suspect it relied on its own bargaining gamble that it could save a great deal of money by trying to

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* Thus, we need not decide what would happen if, say, Jewel picked on only one or a few employees, cutting their wages, and these employees left Jewel over time. There is no systemic conflict in such a case and no necessary trade off by current employees negotiating a new contract.

bind plaintiffs to a deal in which they were as a practical matter unrepresented and powerless. If Jewel thought it could profit by the inherent conflict of interest in this case and bind plaintiffs to the result, it was simply mistaken and must live with the consequences. The new contract is not undermined as a result. Jewel simply make a false legal assumption in signing it. And far from "depriving management of its contractual bargain," our result will help ensure that Jewel lives up to its original bargain and that plaintiffs enjoy the benefit of that bargain.[10] Of course, we express no opinion now on the merits, that is, on whether there was in fact a breach which deprived plaintiffs of their bargain.

In sum, we conclude that in this unique case the Union had no continuing duty to represent plaintiffs when it finally settled its dispute with Jewel. Accordingly, the hybrid suit, Counts II and III, must be dismissed, and the employees may properly proceed in Count I against Jewel alone.

III.

We come, then, to Jewel's alternative argument that a direct suit in Count I is barred by the statute of limitations. For the following reasons, we do not think that the six-month limitations period of § 10(b) of the NLRA properly applies to this direct suit which is essentially one for breach of contract. Instead, Illinois' five-year limitations period for breach of oral contract controls this suit.

A.

The parties agree that interpretation of *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281

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[10] True, the original agreement also envisioned a private grievance procedure. But Jewel refused to abide by that procedure, so it is disingenuous for Jewel to rely on it now. In any event, the original agreement did not call for the Union to represent former employees in their grievances.

(1983), is crucial to analyzing the issue. *Del Costello* was a traditional hybrid suit under § 301, in which the employee alleged that he was discharged in violation of the collective bargaining agreement, and that the union had prosecuted his unsuccessful grievance "in a discriminatory, arbitrary, and perfunctory manner." The suit was filed just under six months after the arbitration result became final.[11] The district court dismissed the suit, applying Maryland's thirty-day limitations period for suits to vacate arbitration awards. The Court of Appeals affirmed. The Supreme Court reversed, holding that the six-month limitations period of § 10(b) of the NLRA was the most analogous and proper one for this type of hybrid suit. The Court's rationale took several steps which we shall detail.

The Court began by noting that § 301's omission of a limitations period required it to borrow a period from some other source. The norm is to borrow the most appropriate state statute of limitations, as the Court did in *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S.Ct. 1107 (1966), but the Court noted it could in unusual circumstances deviate from the norm, if borrowing a state period would frustrate or interfere with national policy. The Court carefully distinguished the hybrid suit from the "straightforward suit under § 301" in *Hoosier Cardinal*, where borrowing a state limitation for breach of contract was held proper. 461 U.S. at 162-63, 103 S.Ct. at 2289. In *Hoosier Cardinal* the union rather than the employee sued the employer over a collective bargaining agreement which had no grievance or arbitration mechanism. The *Hoosier Cardinal* Court refused to adopt a uniform federal standard, finding that the case was closely akin to a "normal" state law breach of contract suit, and as such did not directly involve "those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it." 383 U.S. at

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[11] *Del Costello* involved two consolidated cases. We are giving just one of the fact patterns here.

782, 86 S.Ct. at 1111. In contrast, *Del Costello* emphasized how the typical hybrid suit does implicate these dual consensual processes. Because the hybrid suit requires the employee to show the Union breached the duty of fair representation, it directly challenges the private settlements of disputes under the collective bargaining agreement. 461 U.S. at 164-65, 103 S.Ct. at 2290-91.

Not only is the compound, hybrid suit therefore unlike a simple contract suit, the Court felt that as a uniquely federal creature the hybrid suit has no close analogy in ordinary state law. Neither normal contract limitations periods nor those of arbitration suits fit it well. The latter periods are typically too short to protect employees who are generally green in matters of collective bargaining; and the employees' § 301 claim against the union stems from policies unrelated to those underlying the decision about a proper arbitration period. Not only are arbitration periods too short, statutes for breach of contract or for malpractice[13] are too long. The machinery for resolving Union disputes would become unstable if its resolution can be tampered with many years later. 461 U.S. at 165-68, 103 S.Ct. at 2291-92.

Finding no analogous state law period for the hybrid suit, the Court turned to and found a quite suitable period in federal law, § 10(b) of the NLRA. That section requires chargers of unfair labor practices to be brought before the NLRB within six months. The court noticed a "family resemblance" between an unfair labor practice and the breach of the duty of fair representation. Because Congress already fine-tuned this six-month period to balance the federal interest in stable bargaining and finality of disputes against the employee's interest in having time to set aside an unjust settlement, the Court found

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[13] The Court considered and rejected the argument that the duty of fair representation suit against the Union is like one for legal malpractice. *See* 462 U.S. at 167-68, 103 S.Ct. at 2292.

§ 10(b) to be an apt period for that cousin of the unfair labor practice case—the hybrid suit. 461 U.S. at 169-71, 103 S.Ct. at 2293-94. The Court stressed, however, that in applying a uniform, federal period it was taking an unusual, though not unprecedented, step, and that its "holding . . . should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy." 461 U.S. at 171-72, 103 S.Ct. at 2294.

Despite the Court's limitation of the holding in *Del Costello*, the lower federal courts have been applying *Del Costello* rather liberally in § 301 suits, and even in other labor law contexts. For example, it is probably true that *Del Costello* now applies to *any* hybrid suit under § 301, not just to suits to *vacate* a grievance, which *Del Costello* was. *See, e.g., Flores v. Levy Co.*, 757 F.2d 806, 808-09 (7th Cir. 1985) (and cases cited therein); *Taylor v. Ford Motor Co.*, 761 F.2d 931, 932 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 849 (1986). Moreover, several courts have applied *Del Costello* to suits between unions and employees under Title I of the Labor Management Reporting & Disclosure Act ("LMRDA"), 29 U.S.C. § 411-412. *See, e.g., Davis v. Auto Workers*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1284 (1986); *Vallone v. Teamsters Local No. 705*, 755 F.2d 520, 521-22 (7th Cir. 1985); *Local Union 1397 v. Steelworkers*, 748 F.2d 180, 182-84 (3d Cir. 1984); *but see Doty v. Sewall*, 784 F.2d 1, 3-10 (1st Cir. 1986); *Rodovich v. House Wreckers*, 624 F.Supp. 678, 681-93 (S.D.N.Y. 1985); *Testa v. Gallagher*, 621 F.Supp. 476, 477-78 (S.D.N.Y. 1985). However, the courts have eschewed *Del Costello* in favor of state law periods in some labor cases under § 301. For instance, a suit between an employee against a union alleging a breach of the union's own constitution was held to be essentially contractual and governed by the state law limitations period for breach of contract. *Papianni v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 11*, 622

F.Supp. 1559, 1572-76 (D.N.J. 1985). Similarly, a suit under § 301 by trustees of a pension fund against an employer for failure to contribute to the fund in violation of a collective bargaining agreement was held subject to the six-year limitations period for breach of contract. *O'Hare v. General Marine Transport Corp.*, 740 F.2d 160, 167-68 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 1181 (1985). And when a third party employer sues a union under § 303 of the LMRA because of a secondary boycott, a state law period for tortious interference with business relations is more analogous than § 10(b) *See Carruthers Ready-Mix v. Cement Masons*, 779 F.2d 320, 324-27 (6th Cir. 1985); *Monarch Long Beach Corp. v. Soft Drink Workers*, 762 F.2d 228, 230-31 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 569 (1985); *Park Electric Co. v. Electrical Workers*, 593 F.Supp. 1060, 1063-65 (N.D. Ill. 1984) (Plunkett, J.). Finally, a *non-hybrid* suit brought under § 301 by an employer or union to vacate an arbitration award is controlled by the state law period governing suits challenging such awards. *Plumbers Pension Fund v. Domas Mechanical Contractors, Inc.*, 778 F.2d 1266, 1268-70 (7th Cir. 1985).

As the above summary of *Del Costello* and its offspring suggests, this Court and the parties have had no better luck finding cases on point than we did when dealing with the duty of fair representation issue. However, the above cases offer some help. Viewed together, the cases show that *Del Costello* extends beyond its facts, probably to any hybrid suit under § 301, and sometimes beyond § 301; but *Del Costello* has not swallowed all federal labor disputes or even all § 301 suits. The cases share the same approach to the issue. They analyze the rationale of *Del Costello* to see whether its logic applies sensibly to the peculiarities of the case at bar. *See, e.g., Plumbers Pension Fund*, 778 F.2d at 268-70. We do the same below. While the question is close, we hold that the case resembles *Hoosier Cardinal* more than *Del Costello* and therefore a state limitation period for breach of contract controls.

B.

At the outset, we observe that the Supreme Court in *Del Costello* left the holding of *Hoosier Cardinal* intact, albeit narrowed, and emphasized that resort to state law "remains the norm for borrowing of limitations periods." 461 U.S. at 171, 103 S.Ct. at 2294. *Del Costello* deviated from the norm because of several characteristics of the hybrid suit which make it a special creature--of a species apart from the straightforward contractual dispute of *Hoosier Cardinal*. *See O'Hare*, 740 F.2d at 168 (*Del Costello* "turns on the peculiar nature of the duty of fair representation action, and cannot reasonably be expanded to all Section 301 claims that involve facts which might also have established an unfair labor practice charge.") The key to the hybrid suit is the breach of the duty of fair representation, which as we saw in Part II above flows from the federal labor policy of exclusive representation. That policy is implicated in every hybrid suit. Moreover, the hybrid suit typically challenges the result reached by the consensual process this exclusive representative, the Union, and managment have engaged in; it usually entangles either the formation of a collective bargaining agreement or, more typically, the private settlement through grievance or arbitration of a dispute under one. Congress designed the six-month period of § 10 (b) with these policies, among others, in mind.

This unique case differs from the typical hybrid suit like *Del Costello* in several fundamental ways. *No* duty of representation is involved, so, as we held above, it is a direct rather than hybrid suit. This alone makes the case look more like *Hoosier Cardinal* than *Del Costello*. But more importantly, plaintiffs fell *outside* of the normal private dispute resolution machinery. Once they left Jewel, they also fell outside of the future collective bargaining process. Regardless of how the case turns out on the merits, the private settlement that Jewel and the Union reached will remain intact and unchallenged. The active employees will have received their settlement, and both sides will continue to be bound by their new collective

bargaining agreement. Unlike the typical hybrid suit, which seeks to modify a collective bargaining agreement or to overturn a result reached through a grievance or settlement of a dispute under such an agreement, this case does not intrude on the new contract or settlement reached between Jewel and the Union. This result flows naturally from the holding that no duty of representation existed. The plaintiffs' rights and their remedy are distinct from those of current employees. In short, because plaintiffs were not part of any settlement, this case, unlike *Del Costello*, does not directly implicate "those consensual processes that federal labor law is chiefly designed to promote."[13] 461 U.S. at 163, 103 S.Ct. at 2289. Section 10 (b), which was designed to strengthen and defend the stability of bargaining relationships and to protect a collective bargaining system from delayed attack, *see United Parcel Service v. Mitchell*, 451 U.S. 56, 68, 101 S.Ct. 1559, 1567, (1981) (Stewart, J., concurring), does not pertain to this case, since plaintiffs fell out of the bargaining relationship and system and have no continuing relationship with Jewel.

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[13] We reject Jewel's strenuous argument that this direct suit will undermine the settlement. Jewel offers no legal reason that the contract is not binding. We are not dismantling that agreement. Jewel's real complaint, once again, is that its expectations were undermined, that it signed a contract thinking it had gotten away with scuttling plaintiffs' claims. But plaintiffs were simply not represented then, and Jewel tried to capitalize on that. Jewel made a miscalculation that does not let it off the hook now. Jewel also suggests that our holding means current employees will get less when the next contract comes up, and that our result therefore interferes with the collective bargaining process. This theory (or threat perhaps) is speculation. Given the uncertainties of economics, we cannot say now that our result *necessarily* means current employees will get less in the next contract. That assumes a fixed economic pie. Jewel's theory also only poses an indirect effect on future "consensual processes." We do not think attenuated effects on the process were the kinds *Del Costello* contemplated.

Papianni v. Iron Workers, 622 F.Supp. at 1572-76, offers a slightly different approach which yields the same conclusion. In holding that a suit for breach of a union's constitution is not covered by *Del Costello*, the court distinguished its case from one "absolutely predicated on the existence of an implied claim under the NLRA, or some other federally created right." *Id.* at 1575. *Del Costello* would apply to such suits with a basic "predicate" in federal law or policy–hybrid suits, LMRDA suits, suits to compel arbitration–while *Hoosier Cardinal* remains in control of straight, non-hybrid § 301 suits essentially predicated on breach of contract. *Id.* Applying this "predicate" approach, we see that this suit is not predicated on the duty of fair representation or directly on other substantive federal rights, but simply on the breach of a contract, as was the case in *Hoosier Cardinal*. To hold that *Del Costello* controls this case would be to hold, in effect, that it overruled *Hoosier Cardinal* which it plainly did not.

While this suit differs from *Del Costello* in several ways, we must acknowledge that one of the rationales underlying *Del Costello*–the federal policy favoring quick resolution of labor disputes–does argue for applying the short, six-month limitations period rather than the five-year period we apply below. But that was only one factor which motivated the court in *Del Costello* and cannot suffice by itself to demand adoption of the period of § 10 (b). If this policy alone could carry the day, § 10 (b) would apply to virtually *all* labor disputes, even breach of contract suits not analogous to suits under the NLRA. This result would conflict with *Del Costello's* admonition that borrowing from state law remains the norm, "*in labor law* or elsewhere." 461 U.S. at 171, 103 S.Ct. at 2281. Indeed, the "quick resolution" argument, if sufficient by itself, contradicts the result of *Hoosier Cardinal*, implying once again that *Hoosier Cardinal* had been implicitly overruled, even though *Del Costello* narrowed but reaffirmed the earlier case. And despite the pressure to use short limitations periods in any labor dispute, courts have not done so where the other rationales of *Del*

Costello did not apply. In sum, while a six-month period might for some reasons be desirable, the continued viability of *Hoosier Cardinal* and the Supreme Court's limiting language in *Del Costello* require the Court to borrow the state statute of limitations most analogous to this case.

C.

Plaintiffs contend that either Illinois' five-year period for breach of oral contract, Ill.Rev.Stat. ch. 110, ¶ 13-205 (1985), or the ten-year period for breach of written contract, Ill.Rev.Stat. ch. 110, ¶ 13-206 (1985), applies to this suit. While at first glance, it would seem that the latter period controls since the collective bargaining agreement is written, Illinois courts have applied the five-year statute to suits under collective bargaining agreements. *See Pratl v. Hawthorn—Mellody Farms Dairy, Inc.*, 53 Ill.App.3d 344, 347, 368 N.E.2d 767, 770 (1st Dist. 1977); *Maizer v. Florsheim Shoe Co.*, 132 Ill.App.2d 470, 472-73, 270 N.E.2d 75 (1st Dist. 1971). The courts follow common law doctrine saying that a contract is not "in writing" unless the parties to it, as well as its terms, can be learned from the document itself. If a party is not named in the contract, parol evidence must establish that the person is a party. Thus, since employees are not named in collective bargaining agreements, and parol evidence is needed to show that they are beneficiaries of it, Illinois law defines the contract as "oral" for purposes of appling a statute of limitations to a suit brought by the unnamed party. *See Pratl*, 53 Ill.App.3d at 347, 368 N.E.2d at 770. We therefore find that the five-year period is the most analogous Illinois period, since that is the one Illinois courts have applied in the rare cases where they have been called upon to resolve contract disputes involving collective bargaining agreements. Plaintiffs' suit is plainly timely under this statute.

In light of this analysis, we reject Jewel's argument that the ninety-day period found in the Uniform Arbitration

Act, Ill.Rev.Stat. ch. 10, ¶112(b) (1984),[14] applies here, for the obvious reason that no arbitration occurred involving plaintiffs. Indeed, Jewel exhibits a bit of "chutzpah" in making this argument, since it refused to arbitrate in the first place. But even if its ultimate settlement with the Union could be squeezed into the definition of "arbitration," it was not one which plaintiffs were a party to. Jewel cites no case and offers no sound reason supporting its position that the limitations period for commercial arbitrations would apply to suits where no real arbitration took place and where the plaintiffs were not party to the quasi-arbitration which happened. In any event, even if the ninety-day period were to apply, to be faithful to Jewel's arbitration analogy the only sensible starting date for the period is the day of the "arbitration decision," which can only be the day the Union and Jewel settled. Since plaintiffs sued within ninety days of that settlement, the arbitration period would not bar this suit even if Jewel were right that it was somehow relevant.

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[14] That Section reads:

> (b) An application under this Section shall be made within 90 days after delivery of a copy of the award to the applicant, except that if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known.

IV.

Because the Union owed plaintiffs no continuing duty of fair representation after they left Jewel, we grant the Union's motion for summary judgment and dismiss Counts II and III. We also deny Jewel's motion to dismiss Count I to the extent it is based on the fair representation issue. That motion is also denied with respect to its limitations arguments. In light of our result, we deny as moot Jewel's motion for judgment on the pleadings on Counts II and III and plaintiffs' motion to strike that motion. It is so ordered.

/s/ MARVIN E. ASPEN

Marvin E. Aspen
United States District Judge

DATED 6/26/86

APPENDIX D

D-1

United States District Court
Northern District of Illinois
Eastern Division

KELLY MERK, et al.,

Plaintiffs,

v.

JEWEL FOOD STORES, DIVISION OF JEWEL COMPANIES, INC.,

Defendant.

No. 85 C 7876

Memorandum and Order

After one week of trial, the jury in this case returned a verdict in favor of the defendant, Jewel Food Stores. I did not enter a judgment in accordance with that verdict, pending the receipt of memoranda and responses to the plaintiffs' motion for judgment notwithstanding the verdict, and in the alternative, for a new trial. With these issues now fully briefed, the motions are ripe for decision. For the reasons discussed below, I will deny both motions and enter judgment in accordance with the jury's verdict.

For purposes of these motions, the facts can be briefly summarized. In the fall of 1982, Jewel Food Stores and Local 881 of the United Food and Commercial Workers Union began negotiations on a new three year collective bargaining agreement, to run retroactively from September 15, 1982 to 1985. Of prime concern to Jewel was the expected entry into the Chicago market

of "warehouse" competitors – low price food retailers who in other markets had demonstrated their ability to capture and hold a large portion of the retail food market. In light of this concern, throughout the negotiations Jewel insisted upon various forms of a "most favored nations" clause in the contract. In essence this clause would allow Jewel to match the wages of unionized competitors opening in the Chicago market after the contract term began. The Union refused this demand throughout the negotiations, and the company refused to withdraw it.

Late in the evening of January 23, 1983, the negotiators reached an agreement and the demand for a most favored nations clause was dropped. The dispute giving rise to this case centers on the events leading up to that accord. All agree on this much: that just before agreement was reached, a hallway meeting was held between the Union president, Fred Burki, and two representatives of the company, Neil Petronella, the chief negotiator, and Marsh Collins, a corporate vice president (Fred Burki and Ron Powell, a union vice president, testified that Ron Powell was there as well) and that in that meeting an agreement was reached that paved the way for resolution of the remaining issues. But while all agree that something was agreed upon, the jury heard two very different stories about what that agreement was. According to Burki and Powell, all that was promised was that the Union would "sit and discuss" Jewel's competitive position once the prime warehouse competitor, Cub Food, entered the market; according to Collins and Petronella, Burki agreed to "an economic reopener with full reservation of rights," conditioned upon the entry into the Chicago market of Cub Food. Neither version of the agreement was reduced to writing, either because, as Burki claimed, it was unnecessary, or because, as Jewel claimed, Burki demanded that the agreement be kept in confidence.

An economic reopener has special meaning in the labor context, as Burki, the Union president, testified. Upon the happening of the condition precedent, the economic terms of a collective bargaining agreement are reopened, and both parties

have a duty to bargain in good faith to reach a new agreement. Both sides retain their respective economic weapons, and negotiations proceed as if the parties were bargaining over a totally new contract. *Speedrack, Inc*, 293 NLRB No. 128 (1989).

After the oral agreement was reached, the three or four principals returned to the bargaining table, and reported that agreement had been achieved. Witnesses from the Union testified that Burki said that in return for Jewel's dropping its demand for a most favored nations clause, the Union would agree to "sit and discuss" Jewel's competitive posture after Cub Foods entered the market. Witnesses from Jewel testified that Burki reported that in exchange for the company's dropping its demand for a most favored nations clause, the Union had agreed to a contract reopener upon the entry of the first Cub Foods into the Chicago market.

Were these conflicting stories the only evidence in the case, plaintiffs would have had a strong case. But there was more. Jewel presented negotiation notes of that last negotiation session. In labor negotiations, the testimony showed, negotiation notes are in effect the "legislative history" of the negotiations, and while the notes of the company negotiators clearly indicate that a "reopener" was agreed to, the notes of the Union officials either were missing, or destroyed, or incomplete. In a number of cases, the notes of the Union negotiators end just at the time the agreement was agreed by all to have been reached, an omission that was devastating to the plaintiffs' case.

In the fall of 1983, Cub Foods entered the Chicago market, and shortly thereafter Jewel announced that pursuant to its agreement, it wanted to reopen the contract. The Union and Jewel began the process of negotiations, but just as it got underway, an agent of the International asked to participate as an advisor to the Local. This was Peter Voeller. According to the company, once Voeller was on the scene, the negotiations took a dramatic turn for the worse. Before Voeller turned up, the Union officials had neither questioned nor denied the stated premise

upon which the negotiations rested; once Voeller was present, the Union began to deny that any "reopener" had ever been agreed to. When the Union made clear its refusal to negotiate, the company made its final offer. In February 1984, Jewel announced to its employees that pursuant to the agreement to reopen the contract reached in January 1983, it had attempted to negotiate with the Union, but that because the Union was unwilling to negotiate, it would implement its final offer. On February 26, 1984, Jewel cut the wages of its employees by as much as $1.25 an hour. The Union immediately filed an unfair labor practice complaint with the NLRB, and sued to compel arbitration.

The district court ordered Jewel to arbitrate, and the General Counsel of the NLRB eventually issued a complaint. But in May 1984, on the eve of expiration of the 1982-1985 collective bargaining agreement, the Union and the company again entered negotiations on a new contract. The dispute that had for two years consumed them was resolved within these negotiations, and the company and Union agreed to settle the dispute, Jewel agreeing to pay some backpay to the employees then working at Jewel. The unfair labor practice complaint was dropped, and the district court action dismissed as well.

The settlement between the Union and Jewel left the plaintiffs in this case high and dry. For the plaintiffs in this action are the class of employees who left the employ of Jewel, either voluntarily or involuntarily, between February 1984 and June 1985, when the settlement was effected. Local 881's agreement with Jewel did not include backpay for these plaintiffs, and in 1985, they brought this action against both Jewel and the Union to collect the back wages to which they claim they were entitled under the 1982-85 collective bargaining agreement. The action sought damages against the company for breach of contract and against the union for breach of a duty of fair representation. In a motion for summary judgment, the district court held that the Union had no duty of fair representation to former employees, and therefore that it could not have violated any duty to the plaintiffs' when it settled the dispute with Jewel. 641 F Supp 1024

(ND Ill 1986). In an interlocutory appeal, the Seventh Circuit upheld Judge Aspen's ruling, 848 F2d 761 (7th Cir 1988), and the Supreme Court denied certiorari, 109 SCt 393 (1988). The Union was therefore dismissed, and the case proceeded to trial as a breach of contract case against Jewel Food Stores.

The parties presented conflicting versions of the facts, and resolution of the conflict turned on credibility. The jury had to choose between two wholly different characterizations of that hallway meeting between Burki (and possibly Powell), Petronella and Collins. The dispute as framed was not (as the plaintiffs now hint) over what "reopener" meant in this context. The dispute was instead between the Union's claim that the word "reopener" was never mentioned in the agreement, and the company's claim that the agreement was for a reopener. The jury chose to believe the defendant. Its choice was well supported by the evidence, and would have been my choice as well. Therefore, to the extent that the plaintiffs' post-trial motions rest upon an alleged insufficiency in the evidence to show that there was a reopener agreement, they clearly must fail.

In its motion for judgment notwithstanding the verdict, Merk makes two arguments: first, that there is insufficient evidence to support the jury's finding that the contract was not fully integrated, and second, that there is insufficient evidence to show a practice of ignoring routinely the ratification requirement applicable to collective bargaining agreements.

Whether or not there was an oral reopener agreement, the first question the jury had to determine was whether the parties intended the collective bargaining agreement ("CBA") to be a complete integration of all their understandings. This was a question for the jury because, as Judge Aspen had ruled, it was not clear from the face of the CBA that the written agreement was intended to be a complete integration of all promises, both prior and contemporaneous; therefore the agreement did not on its face rule out the possibility that the parties intended the agreement to be conditioned by a reopener agreement. *Merk v. Jewel Food*

Stores, 702 F Supp 1391, 1401 (ND Ill 1988). So, if the jury had found that the written agreement was intended to be the parties' full agreement, then even if it believed that there was an oral reopener, that oral agreement could not be used to modify the written agreement. *Mohr v. Metro East Mfg*, 711 F2d 69, 72 (7th Cir 1983). Had the jury found that the written agreement was intended to be the full agreement between the parties, then the plaintiffs would have won -- and so the jury was told.

But the jury found that the written agreement was *not* intended to be the full expression of the agreement between the parties, and the evidence supports this finding. The plaintiffs' own witnesses negated the possibility that the written agreement was the only agreement. Burki testified that he agreed to "sit and discuss" in exchange for Jewel dropping the most favored nations clause, and that he intended that agreement to be honored by the Union even though the agreement was not incorporated into the CBA. The defendant offered evidence of other agreements, reached at the time the written CBA was concluded, that the parties intended to be honored but that were not included in the written agreement. These facts alone would have permitted a jury to conclude that the parties did not intend the written agreement to be their complete agreement in the absence of clear language to the contrary.

Perhaps a jury could have concluded that these other agreements were not intended to be part of the collective bargaining agreement, but were rather, as Merk argues, collateral agreements. Certainly if the agreement were a reopener agreement, it had to be intended to be part of the collective bargaining agreement to be effective; perhaps if it were merely an agreement to sit and discuss it did not. But given that the language of the contract did not manifest an intent to integrate, these were questions of intent that the jury was free to decide either way. Any objection that the jury was not properly instructed on this point was in any event waived, for Merk never tendered an instruction that distinguished between collective bargaining agreements and other agreements.

Merk argues that Jewel had the burden of demonstrating that the apparently integrated written agreement was not integrated. As Merk claims, "elementary princip[les] of contract law embodied in the Restatement (Second) of Contracts section 209 establish that where a contract is reduced to writing, that writing is presumed to be an integration of the agreement of the parties *unless evidence of extrinsic agreements is introduced.*" (emphasis added). But here such evidence was abundant, not the least being the testimony of Petronella and Collins that Burki agreed to a reopener that had to remain outside the contract. The jury explicitly found that there was such an agreement, and the very essence of that agreement implied that the written agreement was not complete. Whatever burden Jewel had to bear, the evidence permitted a finding that the contract was not integrated.

More fundamentally, however, Merk argues that it is "against national labor policy" to recognize an oral reopener agreement conditioning the rights of employees under a collective bargaining agreement. As I have discussed in the published opinion issued today, however, there is no national labor policy mandating that a collective bargaining agreement be in writing to be valid.

Merk's second argument for JNOV is that as a matter of law the evidence was insufficient to establish that the Union and Jewel had a practice of ignoring Union requirements of ratification.

As the defendant points out, there is no legal requirement that collective bargaining agreements be ratified by union members. *Chrysler Workers v. Chrysler*, 834 F2d 573, 582 (6th Cir 1987); *Confederated Independent v. Rockwell-Standard Co*, 465 F2d 1137, 1140 (3d Cir 1972); *Cleveland Orchestra Comm v. Cleveland Fed of Musicians*, 303 F2d 229, 233 (6th Cir 1962). Any ratification requirement must come from the union constitution or bylaws. In this case, the Union rules required ratification of the collective bargaining agreement. The question for the jury was

whether this requirement included a requirement that the reopener had to be ratified as well.

The jury found that the agreement did not have to be ratified in order to be valid. There was some evidence that Jewel did not have notice of the requirement of ratification and that notice was required, *Texaco, Inc v. NLRB*, 722 F2d 1226, 1236 (5th Cir 1984); even if Jewel had notice, there was evidence of a number of agreements that were at least arguably within the scope of the collective bargaining agreement but that were not individually ratified yet were understood by both sides to be binding parts of the parties' agreement, thus establishing a practice of ignoring the ratification requirement, *Central States Pension Fund v. Kraftco, Inc*, 799 F2d 1098, 1112 (6th Cir 1986); finally, there was sufficient evidence to support Jewel's reliance on Burki's and the committee's apparent authority to bind the union to reopen the contract as he represented they could.

Merk argues that the examples relied upon by Jewel as examples of commitments made without ratification are "too trivial" to support the general conclusion that there was a practice of ignoring the ratification requirement. The evidence would not have supported the conclusion that the union had no duty to submit any part of the collective bargaining agreement to the members for ratification, but that alone does not make plaintiffs' case. Merk's argument from triviality is contradicted by the evidence of a reopener agreed to in 1969. That agreement was premised upon a raid, not by Cub Food, but by the Teamsters, and allowed the contract to be reopened to renegotiate *higher* wages. If the jury concluded that there was an agreement to reopen the contract in 1969, as it could have, and that that agreement was not ratified, then the agreement in this case was no more significant to Jewel than the 1969 reopener was to the Union, and could be valid even if unratified.

Even if the evidence that there was no need to ratify were insufficient, which it is not, it is not clear that the burden I placed on the defendant to demonstrate a practice of ignoring the

ratification required was justified. The proper question in this context is not the general question -- whether an agreement must be ratified in order to be valid -- but whether Jewel had the right to rely on this agreement even if unratified. Regardless of the more general question, the answer to that question must clearly be yes. As the 6th Circuit has suggested, "absent clear notice that the Union was acting in bad faith against the interests of its members", the company has a right to rely on an agreement whether or not ratified. *Chrysler Workers*, *supra*, 834 F2d at 582. Here there was no evidence presented that Jewel had clear notice that agreeing to the reopener was acting in bad faith against the interests of Local 881's members. To the contrary, it appears that what motivated Burki to keep the reopener secret was tension with the International Union. In return for secrecy, Burki was able to buy an agreement with a company that appeared willing to take a strike. From the perspective of January 1983, Burki's behavior may well have been in the employee's best interest.

Plaintiffs' motion for new trial raises a number of grounds of error, but as the defendant has pointed out, the motion is incomplete. For it is not enough in a civil case merely to cite to an error in admitting or excluding evidence in order to secure a new trial. The movant must demonstrate that the error tainted the verdict in a significant way. FRCP 61. This the plaintiffs have not done. I will, nonetheless, address the grounds that plaintiffs raise.

Plaintiffs first complain of my excluding evidence of the settlement between Local 881 and Jewel in 1985. As I have already mentioned, in 1985, as the 1982-1985 collective bargaining agreement was expiring, and in the midst of litigation in two separate forums, *Merk v. Jewel Food Stores*, *supra*, 848 F2d at 762, Jewel and the Union settled the dispute between them, with Jewel paying some proportion of backpay to workers still in Jewel's employ. Plaintiffs argue that since all the claims in that dispute were not all the claims in this, the settlement is admissible.

Merk's argument would allow exclusion under Rule 408

only if the same case had been previously settled or offered to be settled. But the language of the rule is "claims", not "case", and a case may have many claims. Jewel's claim in this case is that there was a reopener, Merk's is that there was not. That claim or its denial was integral to both the suit to compel arbitration and the NLRB complaint, as evinced by plaintiffs' desire to introduce evidence of the settlement agreement to show that there was no such reopener -- the argument presumably being that the fact Jewel settled makes more likely the fact that there was no agreement. That evidence is inadmissible under Rule 408.

Moreover, it is clear that the purpose of the rule -- to facilitate settlement -- is advanced by its application in this case. Whatever the truth of that January 23, 1983 meeting, it is clear that by 1985 both the Union and Jewel were under pressure to negotiate a new contract. Rule 408 allows a potential litigant to settle its disputes without fear that such a settlement will be used as an admission. It is clear that the plaintiffs intended to use the settlement as such an admission and it was properly excluded.

Finally, even if the evidence was not properly excluded under Rule 408, it should be excluded under Rule 403. In the context of the renegotiations of a labor contract, the probative value of the fact of settlement is slim. Weighed against it is the clearly prejudicial effect such settlement would have had on a jury unschooled in the realities of labor negotiations. It is not true that Jewel Food Stores would necessarily be rational by standing on its claim that there was a reopener agreement even if true rather than settle a dispute with its Union. Without entering into a wide range of inquiries about the nature of the settlement negotiations and the economic conditions faced by Jewel in 1985, a jury is likely to misunderstand the significance of this settlement. The evidence would therefore be excluded under Rule 403.

Merk's second ground of error presents a more interesting question. Sometime after Jewel notified Local 881 that it was reopening the contract pursuant to the reopener agreement, the International representative, Peter Voeller, became involved in

the negotiations. The Local claimed that he was there as "an advisor", but while advising, Voeller sent reports back to the International summarizing his activities and the status of the Locals he represented. In one of these letters to the International, Voeller reported that "apparently an 'agreement' for a reopener was reached ... during the last contract negotiations." Even though this litigation had been pending for five years, and the document in which the statement was made the subject of discovery during those five years, it was not until two months before the start of trial that Jewel discovered the document in the International's files.

Merk stipulated to the document's authenticity; the only question is whether the document should have been excluded on grounds of hearsay. The document reported Voeller's interpretation of statements made to him in the course of his meetings with Union officials, and Merk argues it should have been excluded because it was hearsay, and it contained multiple levels of hearsay. FRE 805. Jewel argues that Rule 801(d)(2)(D) excludes these letters from the definition of hearsay, since they were made by a party's agent and were within the scope of his agency relationship. In the alternative, even if the letters are hearsay, Jewel argues that they are admissible under the catchall Rule 803(24).

The first question then is whether Voeller was the plaintiffs' agent. It is clear that a Local 881 official would have been, since at the time this statement was made, the only plaintiffs who could be plaintiffs were union members, and the officials of a union are clearly agents of the members for purposes of Rule 801(d)(2)(D). Merk argues that Voeller, however, is too tenuously related to the Local to be considered the agent of the union members, and in support, cites a number of authorities that criticize rule 801(d)(2)(D) in general. But whether or not a good rule, Rule 801(d)(2)(D) is the law. The rule makes no distinction for kinds of agents, and does not discriminate based on tenuousness. As the First Circuit has noted, the rule allows admissions by the lowest on the corporate hierarchy as much as

by the highest. *Union Mut Life Ins v. Chrysler Corp*, 793 F2d 1, 8 (1st Cir 1986). The only question then is whether Voeller should be considered part of the Union's hierarchy, and here, given that the Union officials testified that he was there to "advise" Local 881, the answer must be yes. Voeller was within the Union hierarchy, and was therefore an agent of the Union members. His statements are not hearsay.

Merk argues, however, that the document contains multiple layers of hearsay, each of which must be admissible before the document itself it admissible. FRE 805. To this there are two responses. First, even if there is a question whether Voeller is properly considered an agent, the statements he purported to relay to the International are statements by Local 881 employees, and thus clearly within Rule 801(d)(2)(D). Second, the document does not purport to represent what others had said. Instead, the document summarized what Voeller had learned in meetings with local officials, though obviously from the statements of others. They are his interpretations of those meetings. Where the statements are based on such interpretations, the question is controlled by *MCI Communications v. AT&T*, 708 F2d 1081 (7th Cir 1983). In *MCI*, the Seventh Circuit held that the fact a report made by agents was "based on hearsay or reflects opinion goes to its weight and credibility, not its admissibility." *MCI*, *supra*, 708 F2d at 1143. The Voeller letter was properly admitted.

Because I believe that the document was admissible under 801(d)(2)(D), I do not reach the question whether it was also admissible under 803(24). Jewel cites persuasive authority supporting the proposition that where the documents "carry with them an aura of credibility" and where there could not be "a motive that the author would have to fill [the document] with untruth" the document should be admitted under Rule 803(24). *Attorney General v. Irish People*, 595 F Supp 114, 120 (DDC 1984). Rule 803(24) permits the admission of "a statement not specifically covered by any of the [other] exceptions but having equivalent circumstantial guarantees of trustworthiness" if the

court determines that "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served." It is clear here that each of these conditions is met, and were this all the Rule required, there would be little doubt of the letter's admissibility. The Rule requires more, however: that the party seeking to admit the document "make[] it known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, *including the name and address of the declarant*." (Emphasis added.) The whereabouts of the declarant here, Peter Voeller, were unknown. The plaintiffs represented to me that efforts to locate him were unsuccessful. But Rule 803(24) disallows admission of the letter "unless" the condition I have just stated is fulfilled, and here it was not. No doubt, Jewel is not responsible for not knowing the location of Voeller. But in light of the requirement for "name and address" and the absence of an excusing defense of reasonable effort offered by the party seeking the admission of the hearsay document, I am not confident that justifiable ignorance is sufficient.

Merk's next two objections can be considered together, since both are resolved on the same ground. In two pretrial rulings, I limited the defendant's ability to introduce evidence of the existence of a 1969 reopener, and the facts surrounding the resignation of Fred Burki. The only evidence that the defendant intended to offer relating to the 1969 reopener was the testimony of Petronella. Petronella was not involved in the 1969 negotiations, but believed that there was a reopener in the 1969 contract, and the defendant sought only to admit that evidence to show Petronella's state of mind when negotiating the 1982 contract. Plaintiffs objected, and I permitted the defendant to introduce the evidence only for that limited purpose. The second objection concerns evidence relating to Burki's resignation from

the Presidency of Local 881. Plaintiffs objected to such evidence on grounds of prejudice. It appeared that Burki had established a retirement annuity without informing his executive committee, and that while his behavior was perfectly legal, the committee's anger at not being informed lead to Burki's early and quick retirement. Jewel wanted to introduce the evidence to show a pattern of secret dealings by Burki, supporting the conclusion that Burki would have made a secret deal to reopen the contract. Before trial I excluded the evidence on the ground of prejudice, but made my ruling tentative upon the evidence adduced at trial.

Thus, in both cases the evidence Merk now complains of had been limited or excluded before trial. But in both cases, the plaintiffs' own witnesses drew the matters into question. Burki claimed on direct examination that there had never been another oral reopener agreement, but on cross had to admit that there was in fact a reopener in 1969. Once he had made his representation on direct, I could not reasonably have forbidden the defendant to show that it was false. Similarly with the retirement issue. Burki claimed, contrary to fact, that the circumstances surrounding his resignation were perfectly ordinary – that it was motivated solely by the "promotion" he had received to a post in the International. Once he had made this claim, again, I could not reasonably bar the defendant from crossing him on that question, and note that the cross was limited to the parameters I had set before trial.

As I have suggested, this whole case turned on credibility. At issue was the credibility of the Union representatives versus the credibility of Jewel. The evidence relating to the resignation and to the 1969 reopener went to the heart of Burki's credibility, and was invited by Burki's and Powell's own testimony. However unfavorable it was to the plaintiffs' case, I would not have been justified in excluding it from cross examination. If there was a 1969 reopener and Burki knew of it, then he was not entitled to deny its existence merely because I had ruled that Petronella could not claim he knew a reopener existed in 1969. Similarly, Burki was not free to rewrite the facts surrounding his resignation merely because I had ruled that Jewel could not create the

impression that the annuity was improper. All that Jewel demonstrated by both lines of cross examination was that Burki was not being as forthright as plaintiffs wanted the jury to believe.

Merk next argues that evidence of the 1984 negotiations was improperly admitted, standing on their objection made at trial and adding further argument in support of that objection here. This latter argument may be waived as Jewel argues, but I will address it nonetheless.

The evidence at trial suggested that for some time after Jewel notified Local 881 of its intention to reopen the contract pursuant to the reopener negotiated in 1982, Local 881 proceeded as if it was beginning the process of negotiations, without questioning the existence of the reopener. Then following the entry of the International via Voeller, Local 881 changed its position, and began to deny that there ever was any reopener agreed to by the parties. I admitted evidence of these negotiations because it is clearly probative of the question whether an agreement to reopen the contract was reached in 1982. The behavior of Local 881 when served with notice that the contract was to be reopened made more likely the possibility that there was a reopener, for if there was no reopener agreed to in 1983, then it is likely that Local 881 would have squawked; the eventual change in position by the Union was made more understandable once evidence of Voeller's participation was introduced, and once made understandable, made Jewel's story all the more believable. Both aspects were clearly relevant to the question whether a reopener had been agreed to, and for that reason properly admitted.

Merk now argues that the evidence should have been excluded because the word "reopener" did not have a clear meaning to all involved. Hence the plaintiffs were prejudiced, they now claim, by the confusion caused by this ambiguity. If, as Merk claims, reopener did not have a clear meaning, then the fact that "reopener" was used would not indicate that all understood that a "reopener" meant the parties would begin negotiations

anew.

"Reopener" has a meaning in labor law that has recently been made clear by the NLRB. *Speedrack, Inc*, 293 NLRB No. 128 (1989). Merk argues that this meaning was not clear in 1983, and for my purposes, I can assume it was not. Even if it was not, this is not grounds for a new trial. Had the union officials claimed that the a reopener was agreed to but that they did not know what the word meant, then Merk's argument might have merit. But the evidence at trial destroys this possibility. Burki testified unequivocally that he knew what reopener meant, and that he did not agree to a reopener. Powell testified that at first he was "naive" but then came to understand it to mean what Burki had explained that it meant. Thus, there is insufficient evidence to warrant a new trial based on any confusion in the use of "reopener".

Perhaps Powell was confused when Jewel informed him of its intent to reopen the contract. He did testify that at first he was naive, and perhaps the truth was that at first he did not understand the significance of the company's demand to reopen the contract, but after Voeller appeared, he did. Certainly the jury could have so concluded, and certainly Merk was entitled to argue this. But Merk did not so argue the case, and Powell did not so testify, and neither failure entitles Merk to a new trial.

Next Merk argues that it should have been able to introduce evidence demonstrating the actual effect of Jewel's wage cut on its profitability. I excluded this evidence because I concluded that it was irrelevant to the only question in the case, whether an agreement to reopen had been reached. Nothing Merk has offered here weakens that conclusion.

Without objection from plaintiffs, the defendant introduced evidence about the reasons why it believed, in 1982, that it was necessary to cut wages upon the entry of Cub Foods into the Chicago market. This was evidence of motive, and if believed, tended to make more likely the proposition that Jewel

needed a concession in the 1982 negotiations, and that a reopener was that concession. Merk complains that it was not permitted to introduce evidence about the actual effect of Cub Foods on Jewel's profitability. But unlike the evidence of the parties' behavior during the 1984 negotiations, this post-agreement evidence does not in any way affect the likelihood that an agreement was reached in 1983. Jewel could have been wrong about the effect that Cub Foods would have, or the wage cuts could have been just what the market demanded, or any number of other reasons could have explained the actual financial results enjoyed by Jewel after the wage cut was put into place. Nothing about that financial result could have made more or less likely the fact that an agreement had been reached.

Moreover, even if relevant, the evidence would have to be excluded on grounds of prejudice and delay. FRE 403. Plaintiffs wanted to introduce evidence of the total wage savings enjoyed by Jewel – some $80 million. Alone that figure is highly misleading, for the wage cuts were balanced with price cuts as well. Had the evidence been introduced, the defendant then would be entitled to introduce evidence to rebut the inflated $80 million figure, in the form perhaps of expert testimony about the actual effect on demand that the price cuts had, and the overall effect on profitability. Such testimony would have taken the jury far afield of the only question at issue in the trial – namely whether there was an oral reopener agreed to by the parties. The evidence was therefore properly excluded, either under Rule 402 or 403.

Finally, Merk objects to the instructions: that one instruction was not given, and that certain instructions were. The instruction not given, instruction #9, was Merk's "meeting of the minds" instruction, an instruction generally outlining contract law, ostensibly for the jury's education. I am not sure that there is any case in which the instruction would be helpful, for it is not the average or reasonable juror who would find the directive that "A binding contract requires a meeting of the minds of the contracting parties" actually helped him resolve any material dispute.

Besides this general skepticism, the instruction was clearly not called for in this case. Plaintiffs could have argued that there was an agreement about a reopener between the Local 881 and Jewel, but that Local 881 did not understand "reopener" to mean what Jewel meant "reopener" to mean. Had that been the evidence, then something like the instruction proffered would be appropriate. But that was not the evidence in the case. As Jewel argues, plaintiffs are "stuck with Burki's and Powell's denials that 'reopener' was even mentioned by Petronella or Collins on January 27, 1983." Given the denial that a reopener was agreed to at all, there was no evidence to support a verdict resting upon the conclusion that a reopener was agreed to but its meaning is what plaintiffs now want it to mean.

The jury here found Burki's and Powell's testimony not credible; it concluded that there was a reopener agreement entered into between the parties on January 27, 1983. The only evidence presented that supported that conclusion was the evidence of the defendant, and that evidence was that the agreement was for an "economic reopener with full reservation of rights." There was no evidence presented that Burki and Powell understood that agreement to mean something other than what it is understood now to mean, for again, Burki and Powell denied that there was such an agreement. No "meeting of the minds" instruction was therefore necessary.

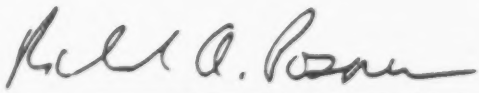
The other objections to the instructions track the arguments made by the plaintiffs in their motion for judgment notwithstanding the verdict. Because I do not believe that their arguments on the law in that motion were correct, I will not address again the same arguments in this context. I will however note one argument by plaintiffs not addressed before.

Merk argues that a new trial is merited because the order of issues presented in the substantive instructions differed from the order of the special interrogatory, thus confusing the jury and tainting the verdict. This argument is baseless, and its inclusion

here does not help plaintiffs' case. The verdict was consistent both internally and with the evidence. It is true that the jury was instructed that it must determine whether (1) there was an integration, and if it determined that there was not an integration, (2) whether there was a ratification requirement, and if not a ratification requirement, (3) whether there was a reopener, while the verdict form asked the jury to determine (1) then (3) then (2). An "inconsistency" in the order of explication does not demonstrate an error sufficient to taint the verdict of this jury. There is no suggestion made by the plaintiffs why resolving one question before the other would in anyway be misleading to the jury in its determination. Merk's objection here is absolutely without basis.

Plaintiffs' motions are denied. The judgment for the defendant in accordance with the verdict will be entered forthwith.

Finally, in response to a number of arguments made by both parties, I ordered each side to show cause why it should not be sanctioned pursuant to Rule 11. Having reviewed the submissions by each, I have decided that, however tenuous, both parties had an adequate basis in fact and law for the arguments made, save two unintentional errors by the plaintiffs. Rule 11 sanctions are not appropriate.



Richard A Posner, Circuit Judge
(Sitting by designation)

Date: April 9, 1990

United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

Kelly Merk, et al

v.

Jewel Food Stores, Division of Jewel Companies, Inc.

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
85 C 7876/85 C 10362

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is entered in favor of defendants, Jewel Food Stores Division of Jewel Companies, Inc., etal and against the plaintiffs, Kelly Merk, etal, in accordance with the verdict of the jury.

April 9, 1990
Date

H. STUART CUNNINGHAM
Clerk

/s/ GLADYS LUGO
Gladys Lugo
(By) Deputy Clerk

APPENDIX E

United States District Court
Northern District of Illinois
Eastern Division

Kelly Merk, *et al.*,

Plaintiffs,

v.

No. 85 C 7876

Jewel Food Stores,
Division of Jewel Companies, Inc.,

Defendant.

OPINION

April 9, 1990

POSNER, *Circuit Judge* (sitting by designation). This is a class action by employees of Jewel Food Stores, the grocery chain, against the chain, charging that it reduced their wages below the level fixed in the collective bargaining agreement between the company and the union representing the employees. Jewel contends that at the same time it signed the collective bargaining agreement it made an oral side-agreement with the union, a "reopener" agreement which provided that upon a designated contingency coming to pass (namely the entry of particular competitor into Jewel's market) the "economic" provisions of the agreement (e.g., wages and hours) would be repealed. The plaintiffs deny that any such agreement was made and further argue that if it was made, still it was invalid for a variety of reasons. The suit is under section 301 of the Taft-Hartley Act, 29 U.S.C. § 185.

Before the trial, I granted partial summary judgment on three issues, that, because of their novelty, merit discussion in a published opinion; but I issued no opinion at that time. The trial resulted in a jury verdict for Jewel, and Merk's post-trial motions raise a fourth issue that merits such discussion. The other issues raised by Merk's motions I have resolved in an unpublished order,

issued today, in which I direct the entry of judgment for Jewel in accordance with the jury's verdict.

1. The suit is on behalf of all Jewel employees who received the lower wage that the company set in purported reliance on the oral reopener. Originally I ruled that employees who were hired *after* the lower wage was in place have no cause of action and therefore are not entitled to any of the damages that the plaintiffs have sought even though they are part of the class. I based this ruling on the absence of any evidence that these employees signed on with Jewel in the expectation that they would receive a retroactive raise because the collective bargaining agreement had been violated. This is true but (as both sides now agree) irrelevant. These employees are third-party beneficiaries of the agreement, and they are entitled to its benefits unless there was a valid oral reopener cutting down on those benefits as they appear in the written agreement.

2. The complaint seeks punitive damages for what the plaintiffs describe as Jewel's "outrageous" conduct in fabricating an oral reopener. I agree with Jewel, and with the majority of courts that have addressed the question, Annot., *Award of Punitive Damages Under § 301 of Labor Management Relations Act*, 71 A.L.R. Fed. 221 (1985), that punitive damages are not available in a section 301 suit. The Supreme Court has so held with regard to union defendants sued for breach of their duty of fair representation, *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), and it would be unreasonable to distinguish between union and employer defendants in this regard, or between suits for breach of contract and suits for breach of the duty of fair representation:

a. When the Taft-Hartley Act was passed in 1947, punitive damages for breach of contract were virtually, perhaps completely, unknown. Section 301 of the Act does not create a complete remedial scheme. Essentially it just makes collective bargaining agreements actionable, and leaves the incidents of the 301 suit—statute of limitations, other defenses, third-party beneficiaries, parol evidence rule, and all the rest, including remedy—to be worked out by the courts in the exercise of their ill-defined but adequate power to make federal common law. In interpreting other statutes that create a federal right without specifying the

details of remedy and procedure, notably 42 U.S.C. § 1983, a statute first passed in 1871, the Supreme Court has looked to the common law at the time of enactment. *Smith v. Wade*, 461 U.S. 30 (1983). If that approach is taken here, it becomes evident that punitive damages are unavailable in section 301 suits.

b. Punitive damages are of course far more common in tort cases than in contract cases. Breach of the duty of fair representation is a form of breach of fiduciary duty, and is therefore a tort. Since punitive damages are not available for breach of the duty of fair representation (*Foust*), they surely are not available for a simple breach of contract.

c. Partly in explanation of *Foust*, partly related to the point just made, federal policy aims to promote harmonious labor relations; this is one of the justifications for the mildness of the National Labor Relations Board's remedial powers. 442 U.S. at 52; *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940). That aim would be deflected if punitive damages were available in section 301 suits. The possibility on the one side of recovering and on the other side of having to pay potentially astronomical damages would place a cloud over labor negotiations, engendering formality and suspicion inimical to the harmonious resolution of labor disputes.

All three reasons I have just given are independent of whether the defendant is a union or an employer. I am convinced therefore that the Supreme Court would not allow punitive damages to be awarded against employers for violating collective bargaining agreements. At the very least, it would not allow the award of punitive damages in a case such as the present, a case at worst of *simple* breach of contract (this much the jury's verdict for Jewel makes clear), uncomplicated by evidence of fraud or other tortious misconduct. For even outside the labor field, punitive damages are not awarded for simple breaches of contract. *Patton v. Mid-Continent Systems, Inc.*, 841 F.2d 742, 750-51 (7th Cir. 1988).

3. The next question is the force to be ascribed to an oral reopener agreement. To Jewel, it means that the pertinent provisions of the contract were repealed when the reopening occurred, and therefore the employees have no further remedy

under the contract. Jewel concedes that the abrogation of the contract does not dissolve the parties' duty to bargain collectively in good faith. It merely puts the parties back to square one—that is, to the situation before there was a collective bargaining agreement—with respect to the provisions covered by the reopener. That state is not quite Hobbes's state of nature. The parties are obligated to bargain in good faith, and only when, having done so, they find themselves at loggerheads ("impasse" in the jargon), are they free to resort to their economic weapons—the strike, the lock-out, the (as here) unilateral reduction in wages. But the obligation to bargain in good faith is imposed by section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), not by contract, and so it cannot be enforced by a suit under section 301 of the Taft-Hartley Act.

The plaintiffs concede that "reopener" is a term of art in the labor lexicon and that in its recent decisions the Labor Board has defined reopener just as Jewel does—as meaning repeal of the provisions of the collective bargaining agreement that are subject to the reopener. *Speedract, Inc.*, 293 N.L.R.B. No. 128, at pp. 3-7 (1989). But they say that if Jewel and the union agreed to a reopener, they were not using the term as one of art. They meant not to repeal the relevant provisions of the contract but simply to suspend their operation *provided* that Jewel bargained in good faith and reduced wages only when, having bargained in good faith, the parties reached an impasse. And they say the condition was not fulfilled—Jewel didn't bargain in good faith but instead implemented a fixed pre-existing plan to reduce wages—and therefore that the terms of the reopener were not fully honored. So the reopener was never activated.

When persons in a trade or business or other activity put into a contract (oral or written) a term that is a term of art within the particular trade or business or activity—that has, in other words, a well understood meaning in the particular community in which the contract was made—the parties can be presumed to have used the term with that meaning. Cf. White & Summers, Handbook of the Law Under the Uniform Commercial Code 100 (2d ed. 1980). The plaintiffs have presented no contrary evidence. The union had its remedies under the National Labor Relations Act against Jewel's bargaining in bad faith. There is no indication it negotiated for a contractual remedy as well.

4. The previous point assumed the propriety of oral reopeners, but the plaintiffs also argue that an oral reopener that limits rights conferred by a collective bargaining agreement is against federal labor policy. They rely on cases that appear to disallow oral modifications of such agreements, especially where the modification is of a pension or welfare trust established by the agreement, or of a provision relating to governance. *Central States, Southeast & Southwest Areas Pension Fund v. Behnke*, 883 F.2d 454, 459-60 (6th Cir. 1989); *NLRB v. Westinghouse Broadcasting & Cable, Inc.*, 849 F.2d 15, 19 (1st Cir. 1988); *Waggoner v. Dallaire*, 649 F.2d 1362 (9th Cir. 1981). Yet it is a settled principle, firmly bottomed on section 8(d) of the National Labor Relations Act, that the collective bargaining agreement itself need not be in writing unless one of the parties requests that it be. 29 U.S.C. § 158(d); *Gariup v. Brichler Ceiling & Interior Co.*, 777 F.2d 370, 373-74 (7th Cir. 1985); *Central States, Southeast & Southwest Areas Pension Fund v. Behnke supra*, 883 F.2d at 459; *Eastern Washington Distributing Co.*, 216 N.L.R.B. 1149, 1151 (1975). How to weave together the two threads? The answer is hinted at in *Price v. International Brotherhood of Teamsters*, 457 F.2d 605, 609 (3d Cir. 1972), a case paradoxically relied on by the plaintiffs in this case. Statutes like Landrum-Griffin and ERISA impose obligations in the *administration* of collective bargaining contracts; oral modifications, unknown to the union rank and file, can upset entitlements created by the contracts and enforced in administering them. But these statutes do not seek to interfere with the negotiation of the agreement—the domain of the National Labor Relations Act, section 8(d) of which is a considered decision to allow oral agreements when both parties prefer them. *Hamilton Foundry & Machine Co. v. International Moulders & Foundry Workers Union*, 193 F.2d 209, 214 (6th Cir. 1952). If oral agreements are permissible with both parties' consent, and they are, then an agreement part written and part oral should also be permissible, and that is what we have here. The oral reopener was adopted in the midst of contract negotiations; the negotiations were concluded and the contract was signed after the oral reopener agreement was made. It did not modify the contract; it was part of the contract. It was not against federal labor policy.

APPENDIX F

F-1

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate Marvin E Aspen

Sitting Judge/Mag. If Other Than Assigned Judge/Mag. Richard A Posner

Case Number: 85 C 7876

Date: 1/25/90

Case Title: MERK v. Jewel Food Stores

* * *

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(2) [X] [Other docket entry:]

Entering Memorandum Opinion and Order on Eleven pretrial motions in anticipation of trial, 1/29/90.

/s/ RICHARD A. POSNER

* * *

(12) [X] (For further detail see

[X] order attached to the original minute order form.)

[X] Docketing to mail notices.

courtroom deputy's initials GI

United States District Court
Northern District of Illinois
Eastern Division

KELLY MERK, et al.,

Plaintiffs,

v.

JEWEL FOOD STORES,
DIVISION OF JEWEL COMPANIES, INC.,

Defendants.

No. 85 C 7876

Memorandum and Order

This order disposes of eleven motions made in anticipation of trial, and resolves the two remaining questions of damages.

1. Jewel's Motion for Summary Judgment as to Count V

I have reviewed Jewel's motion for Summary Judgment as to Count V, and Merk's response, and will GRANT that motion dismissing Count V. The issue of punitive damages in Section 301 cases is an important one, and I will address the question in depth in a written opinion to be released.

2. Jewel's Motion to Bifurcate Issues for Trial

In light of my ruling on Jewel's motion for summary judgment, and my rulings on the two damages issues in point 11 below, Jewel's motion to bifurcate the trial is moot. The trial

commencing on Monday, January 29, 1990 will focus exclusively on the question of liability. If MERK prevails on liability, I will enter judgment according to the stipulated damages entered December 19, 1989, subject to the rulings on damages below.

3. JEWEL'S MOTION TO EXCLUDE ANY EVIDENCE OF EVENTS OCCURRING AFTER FEBRUARY 15, 1984; MERK'S MOTION TO EXCLUDE ANY EVIDENCE OF MEETINGS BETWEEN THE UNION AND JEWEL SUBSEQUENT TO OCTOBER, 1983.

My ruling on summary judgment reduces the issues for trial to these: whether there was an oral reopener, and if there was, the scope and effect of that reopener. Both of these motions concern the scope of testimony relevant to these issues.

The parties may introduce any evidence tending to make more or less probable the existence of a reopener. Such evidence may include evidence of events occurring after the alleged reopener was concluded so long as those events make more or less probable the existence of a reopener. JEWEL claims that it made explicit reference to the oral reopener when asking the Union to renegotiate the collective bargaining agreement, and that the Union did not contradict that representation before commencing mid-term negotiations. If believed, that is evidence of conduct consistent with the existence of a reopener, and is admissible to establish its existence. *See Hellenic Lines Limited v. Gulf Oil Co*, 340 F2d 398, 401 (2d Cir 1965); *Apex Oil Co v. Vanguard Oil & Service Co*, 760 F2d 417, 422 (2d Cir 1985); *Moridge Mfg v. Butler*, 451 NE2d 677, 680 (Ind App 3 Dist 1983). While it is true as MERK points out that silence in the face of an offer will not ordinarily be construed as an acceptance, *Acme Markets v. International Ass'n*, 506 F Supp 92, 99 (ED Pa 1980), the silence relied upon by JEWEL is not offered as evidence of the Union's *acceptance* of the oral reopener, but instead of its *existence*.

MERK relies upon a footnote in an earlier opinion by Judge Aspen in this case to support its argument that this evidence should be excluded. There Judge Aspen wrote:

> "Jewel also contends that the Local's participation in negotiations after Cub Foods entered the market and Jewel unilaterally reduced wages and benefits is itself evidence that the Local ratified the alleged reopener agreement or entered into one later. We reject this position. That the Local sought negotiations rather than a lawsuit is consistent with the federal labor policy to encourage the extrajudicial resolution of disputes rather than a reflexive rush to the courts. The Local did not accept a modification to the collective bargaining agreement merely by discussing it."

Merk v. Jewel Food Stores, 702 F Supp 1391, 1401 n.10 (ND Ill 1988).

Certainly the mere fact that the Union entered mid-term negotiations does not establish that there was an agreement executed at the same time as the collective bargaining agreement to enter such mid-term negotiations. Nor does the fact that the Union entered negotiations entail that it accepted a modification of the agreement, or that it accepted at that time an agreement to reopen the contract. The evidence JEWEL intends to offer does not make any of these leaps. While evidence that the Union entered mid-term negotiations does not show that there was a reopener, evidence that the Union did not object to JEWEL's assertion that there was a reopener certainly suggests that a reopener had been agreed to. JEWEL's evidence makes the existence of the reopener more likely, and evidence does not have to be conclusive to be admissible.

Therefore, I will DENY MERK's motion to exclude all

evidence of meetings with the Union and JEWEL after October, 1983.

JEWEL's motion raises a distinct issue. None dispute that in February, 1984, JEWEL unilaterally reduced the wages of its employees. At that point, a dispute between the Union and JEWEL erupted, and JEWEL argues that the events after February are inadmissible by reason of FRE 408.

Rule 408 is not a broad ban on all evidence of events following the birth of a dispute between two parties. By its own terms, the "rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The rule permits evidence of offers to compromise or of conduct or statements made in compromise negotiations when "the evidence is offered for another purpose, such as proving bias or prejudice." Therefore, to the extent JEWEL's motion seeks simply to ban all evidence after the beginning of this dispute, it seeks too much, but to the extent it seeks to exclude evidence already excluded by Rule 408 it is unnecessary.

Nonetheless, I will GRANT JEWEL's motion to the extent that it is understood as covering only that evidence encompassed within the scope of Rule 408. Evidence otherwise admissible because tending to establish the existence or nonexistence of a reopener will be excluded where that evidence derives from offers to compromise the claim, or compromise negotiations, within the scope of Rule 408.

4. JEWEL'S MOTION TO EXCLUDE EVIDENCE OF OUTSTANDING CLAIMS ENTERED INTO BY DEFENDANT AND UNION IN JUNE 1985

The resolution of this motion follows directly from the discussion above. For purposes of liability, Rule 408 excludes evidence of the settlement reached by JEWEL with the Union, since the claims there settled were the identical claims pressed by these

plaintiffs. JEWEL's motion is GRANTED.

MERK's concern that the jury will be confused can be addressed without introducing evidence of the settlement. The parties are invited to draft a stipulation or instruction for the start of trial which would allay the concerns MERK expresses.

5. JEWEL MOTION TO EXCLUDE EVIDENCE OF THE RATIFICATION OR LACK THEREOF OF THE REOPENER

Late in this litigation, MERK has raised ratification as a bar to JEWEL's reopener defense. MERK claims that even if there was a reopener agreement, it is invalid since not ratified. JEWEL seeks to exclude such evidence on a number of grounds, including the claim that if the failure to ratify the reopener makes the reopener invalid, it likewise makes the whole collective bargaining agreement invaiid. JEWEL provides no authority for its novel claim, and it cannot be correct that an entire collective bargaining agreement would be invalid because one part was not ratified. A Union cannot pick and choose which parts of the collective bargaining agreement it wants to enforce by submitting selected sections to its members, but the remedy for this fault does not consist of abandoning the agreement completely.

The question is immaterial to this motion in any case. JEWEL's motion is a motion *in limine*; it seeks to exclude evidence. Whether or not an unratified oral reopener is enforceable, the existence of a ratification requirement is probative of the existence of a reopener. If ratification is required, and no ratification was pursued, that makes it less probable that there was a reopener at all.

If JEWEL had demonstrated that in no context would the existence of a ratification requirement affect the enforceability of any agreement not ratified, then it would have undermined the probative value of evidence about the ratification requirement. In its motion *in limine*, JEWEL provides no authority for such a conclusion; however, JEWEL's other pretrial submissions do add-

ress the question. The most that can be derived from the authority that JEWEL cites, however, is that if there is a practice of accepting unratified agreements notwithstanding a ratification requirement, then the failure to ratify will not be fatal to the agreement's enforceability. *Central States SE and SW v. Krafico, Inc*, 799 F2d 1098, 1112 (6th Cir 1986). But to establish the predicate of this test, JEWEL would have to introduce evidence of other agreements that were enforceable or enforced even though not ratified. If the ratification requirement would be relevant to establish the enforceability of those other unratified agreements, JEWEL cannot contend that it is irrelevant to the existence or effect of the reopener agreement at issue in this case.

JEWEL's motion is therefore DENIED.

6. JEWEL's MOTION TO EXCLUDE TESTIMONY OF NAMED PLAINTIFFS

As I have structured the trial, the only issue before the jury is the existence and effect of the alleged reopener agreement. Only evidence relevant to that question will be admitted. JEWEL has asked me to exclude the testimony of named plaintiffs, since they could offer no evidence relevant to the existence or effect of an oral reopener; JEWEL also argues that the plaintiffs are not representative members of the class since the damages they have suffered is disproportionately large. While this latter argument if true would stand in tension with the determination that these class members would be representative for purposes of class certification, since damages are no longer an issue in the trial, I will ignore that problem here.

The plaintiffs may of course testify just like any other witnesses if they have relevant evidence to offer. MERK argues that due process entitles them to more, an argument bordering on the sanctionable. Nothing MERK cites stands for the proposition that a plaintiff in a civil case has the right to testify even if he has no evidence to offer. Nor could MERK cite authority for such a position.

I am uncomfortable, however, with granting JEWEL's motion unconditionally, for plaintiffs could use these witnesses to establish the fact that JEWEL reduced their wages. Because damages have been stipulated, and because punitive damages are not at issue, the total amount lost by any plaintiff is not relevant. For the sake of clarity for the jury, however, it would be permissible to allow plaintiffs to establish the size of reduction relative to the wages established in the collective bargaining agreement. For example, named plaintiffs could testify that their wages were reduced from $X/hr to $Y/hr, but could not testify as to the total amount they thereby lost. I will not hesitate to limit cumulative testimony, so that the need to call more than one named plaintiff to establish these limited facts must be clearly established.

None of this testimony is of course necessary. The parties could just as easily stipulate to all the facts to which the named plaintiffs could testify. But in the absence of such a stipulation, I will not unconditionally bar the testimony of named plaintiffs. MERK may call them for the limited purpose I have outlined. If, however, the testimony exceeds these limits, upon objection by JEWEL, I will not hesitate to limit further testimony. I want strongly to avoid evidentiary battles before the jury, and urge both parties to keep that in mind when eliciting testimony outside the scope of relevancy.

7. MERK's MOTION TO EXCLUDE EVIDENCE OF FACTS CONCERNING FRED BURKI's RETIREMENT.

MERK asks me to exclude evidence of Fred Burki's involvement in alleged violations of Union rules relating to the purchase of an annuity for his pension. JEWEL responds that such evidence is relevant under Rule 404(b) to establish (1) a motive for Burki to avoid activities that would draw the attention of the Union's International; (2) knowledge of Jewel's chief negotiator of the Union's internal turmoil; (3) evidence of the relationship between Jewel's and the Union's negotiator; and (4) questions of Union reputation relevant to the punitive damages count, a ground made moot by my decision above. JEWEL also asserts that Burki can be

cross-examined with the evidence of past acts under Rule 608(b) if the acts are probative of his character for truthfulness. For the reasons that follow, I will conditionally GRANT MERK's motion, subject to reconsideration upon the presentation of a fuller foundation.

If (a) the annuity incident did give Burki a motive to avoid review by the Union's International, and (b) weakening the contract by incorporating a "most favored nations clause" or a reopener agreement would have invited International review, then evidence concerning the incident would be at least probative of motive. But these factual predicates must be established. The motion *in limine* and its response have not presented me with enough to determine precisely the link between the incident involving the annuity and the motive to conceal. If, however, JEWEL is able to demonstrate such a link within the motive exception to Rule 404(b), then I would reconsider my decision to exclude such evidence. I also don't think that the facts surrounding Burki's resignation are necessary to establish JEWEL's knowledge of Union turmoil, or to establish the strength of the relationship between Jewel's and the Union's negotiators.

If Burki does testify, then if the events surrounding his resignation bear on Burki's truthfulness, they would be relevant to cross-examination under Rule 608(b) "concerning the witness' character for truthfulness or untruthfulness." But as presented, neither party has given me enough to determine how such facts would bear on his truthfulness. If JEWEL wants to explicate the link more fully, it may do so and I would reconsider the question before Burki testified. But based on the information as submitted, I cannot determine whether the events actually relate to Burki's character for truthfulness.

8. MERK'S MOTION TO EXCLUDE EVIDENCE OF UNION REPRESENTATION OF PLAINTIFFS

MERK moves to exclude any evidence by JEWEL of the Union's representation of the plaintiffs during the negotiations

leading to the settlement between the Union and JEWEL. JEWEL claims that such evidence is relevant in the damages stage of the trial, to show that JEWEL reasonably relied upon the Union's apparent authority to represent the interests of the employees who had left JEWEL's employ. JEWEL concedes that the law of this case is that the Union had no duty to represent the employees; but argues that they nonetheless purported to represent the employees, and that that purported representation excuses JEWEL from liability.

I will GRANT MERK's motion. The trial as framed by JEWEL in its trial brief does not reach the common law agency issue. It is not, therefore, an issue that will be tried by this Court. Even if it had raised this as an issue for trial, the likelihood that former employees agreed that the Union would represent them in settlement negotiations following the wage cut is slight at best. JEWEL's reliance on dicta from the Seventh Circuit suggesting the possibility of this agency relationship is misplaced, and it has failed to present or preserve the issue for trial.

9. MERK's MOTION TO EXCLUDE EVIDENCE OF A PRIOR ORAL AGREEMENT

MERK has asked that no evidence of a prior oral agreement between Jewel and the Union be admitted; JEWEL has responded that it intends only to introduce evidence that (1) Petronella had participated in mid-term negotiations pursuant to what he understood was an oral reopener agreement; (2) those negotiations resulted in a change in the wage scale in 1970; (3) and Petronella was aware of those facts when he negotiated the agreement in 1983.

So long as the evidence is limited as indicated, I will DENY MERK's motion.

10. MERK's MOTION TO EXCLUDE ANY EVIDENCE SUGGESTING THE EXISTENCE OF AN ORAL REOPENER AGREEMENT

Finally, MERK asks me to exclude any evidence of the existence of an oral reopener agreement entered into at the time JEWEL and the Union signed the collective bargaining agreement in 1983. Granting such a motion would essentially obviate the need for any trial at all. But for the reasons that follow, I will DENY the motion.

MERK claims JEWEL should be barred from introducing evidence about the reopener since (1) the reopener was not pled as an affirmative defense; (2) the reopener did not give JEWEL a right unilaterally to implement changes if and when the renegotiations failed; (3) the agreement is unenforceable since not ratified; (4) the agreement is prohibited by Federal Labor policy.

(1) MERK's first argument is frivolous. If there was an agreement to reopen the contract upon the happening of certain events, and those events happened, then the actions pursuant to that reopener do not constitute a breach of the collective bargaining agreement. An affirmative defense is a "yes but" defense: "yes" there was a breach, "but" I should not be held liable. JEWEL's argument is that there was no breach, and is not an affirmative defense.

(2) MERK's second argument is little more than frivolous. As JEWEL points out, the scope of any reopener is an issue of interpretation; its uncertainty is not grounds for excluding evidence about a reopener.

(3) Next MERK argues that even if there was an agreement, it is unenforceable since unratified. This argument is potentially very strong, though not strong enough to foreclose the admission of evidence of a reopener agreement.

There is strong authority for the proposition that an employer who knows of a ratification require-

ment, and who knows that a provision has not been ratified, cannot rely upon an unratified agreement. *Texaco v. NLRB*, 722 F2d 1226, 1236 (5th Cir 1984). *Compare Deboles v. TWA*, 552 F2d 1005, 1018 (3d Cir 1977); *Meyerson v. Contracting Plumbers Ass'n*, 606 F Supp 282, 287 (SD NY 1985). However, if there is a practice or understanding that the Union's agent may bind the Union without ratification, despite the requirement of ratification in the Union constitution, then the agreement may still be enforced against the Union. *Central States Southeast and Southwest Areas Pension Fund v. Kraftco*, 799 F2d 1098, 1112 (6th Cir 1986); *NLRB v. Brother of Painters*, 334 F2d 729, 731 (7th Cir 1964). JEWEL claims that it will show that the practice of the Union was to ignore the ratification requirements, and that it did that for a number of agreements.

This JEWEL needs to show. For if there was a requirement of ratification known by JEWEL, unless there was also an understanding that agreements would be enforceable notwithstanding the requirement, the oral reopener would not be enforceable.

The proper handling of this question of ratification, however, is not to exclude evidence of an unratified reopener. Rather, it is to require that the jury make specific findings about the ratification process. The jury will be asked, therefore, whether there was a ratification requirement, and if there was, whether the Union and JEWEL had a practice of ignoring that requirement so that agreements outside the requirement were nevertheless enforceable. Obviously, MERK bears the burden on the first question; JEWEL on the second.

(4) Finally, MERK argues that an oral reopener is contrary to the policy of the NLRA, Section 8(d),

29 USC 158(d) and contrary to the parol evidence rule. This argument, like the others, must fail.

As JEWEL suggests, it is beyond dispute that nothing in the NLRA precludes a written reopener agreement. *NLRB v. Red Lion Oil Co*, 353 US 282 (1957). Oral reopener agreements, made as a part of the original contract, may be bad policy for both Union and company alike. (As this case evidences. See also *Central States Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc*, 854 F2d 1074, 1078 (7th Cir 1988).) But there is no federal policy requiring that all parts of a collective bargaining agreement be in writing. *Certified Corp v. Hawaii Teamsters*, 597 F2d 1269, 1272 (9th Cir 1979). The parties are free to structure their agreement as they wish.

Nonetheless, plaintiffs argue that admission of the oral reopener is contrary to the parol evidence rule. There is no doubt that there is a parol evidence rule for collective bargaining agreements, *Mohrv. Metro East Mfg*, 711 F2d 69, 72 (7th Cir 1983), and no doubt that the evidence and the agreement is parol. But the rule does not bar all parol evidence: parol evidence is only suppressed where the contract makes clear that the parties intended the written agreement to be a "complete expression of the agreement that they had reached, to the exclusion of all prior negotiations, whether oral or written." Farnsworth, Contracts 451 (1982).

In this case, there is no clear indication that the parties intended the written agreement to be a complete expression of all prior negotiations, and therefore that remains an issue for trial. The clause closest to an integration clause differs in an important respect from ordinary integration clauses. It

states

> This agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the employer and the union.

Unlike the traditional integration clause, there is no representation that the agreement represents the complete understanding of the parties, and merges all prior and contemporaneous understandings. Therefore, there is no clear predicate for applying the parol evidence rule to exclude evidence of an oral agreement.

The motion to exclude evidence of an oral reopener agreement is DENIED. The parties are directed to present evidence on the ratification requirement sufficient to allow the jury to answer the questions outlined above.

11. REMAINING QUESTIONS ON DAMAGES

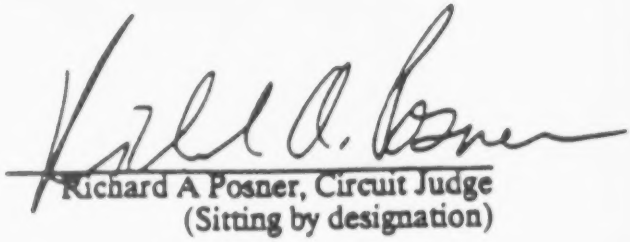
Left are two issues concerning damages if the jury finds JEWEL breached the collective bargaining agreement. The parties have stipulated as to compensatory damages. MERK has asked for prejudgment interest; JEWEL has asked that the class be reduced to exclude those employees who were hired at the lower wage rate.

Neither party has moved for summary judgment on these questions, but I believe it would be helpful for me at this stage to rule on the questions, subject to reconsideration following briefing after the trial. Therefore, I rule that

(1) the plaintiffs are entitled to prejudgment interest as a matter of law. *Gorenstein Enterprises v. Quality Care-USA*, 874 F2d 431, 436 (7th Cir 1989).

(2) the plaintiff class should be reduced by excluding those employees who were hired after the unilateral wage reduction.

I will address more fully the reasoning behind this second conclusion in a written opinion to be issued before the end of trial. Again, I will reconsider either ruling upon motion after the conclusion of the trial, if in fact plaintiffs prevail, and after each side has had an opportunity to fully brief the questions raised.



Richard A Posner, Circuit Judge
(Sitting by designation)

Date: January 25, 1990

APPENDIX G

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 27, 1988.

Before

Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

KELLY MERK, et al.,
Plaintiffs-Appellees,

No. 86-2723 *v.*

JEWEL COMPANIES, INC.,
Defendant-Appellant.

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 85 C 7876

Marvin E. Aspen,
Judge

ORDER

Defendant-Appellant filed a petition for rehearing and suggestion of rehearing en banc on June 14, 1988. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX H

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 20, 1991

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, Jr., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

KELLY MERK, JOSEPH STASZEWSKI, and VICKIE MENAGH, et al.,
Plaintiffs-Appellants,
vs.
JEWEL FOOD STORES DIVISION OF JEWEL COMPANIES, INCORPORATED, et al.,
Defendants-Appellees.

No. 90-2184

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 85 C 7876
Richard A. Posner, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause, a vote of the active members of the court was requested, and a majority of the active members of the court have not voted to grant rehearing in banc.[1] A majority of the judges on the original panel have voted to deny rehearing. Accordingly,

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[1] Judges Wood, Jr., Flaum, Easterbrook, Manion and Kanne voted to grant rehearing in banc.

Judge Richard A. Posner took no part in consideration of this appeal.

It is ORDERED that the aforesaid petition for rehearing and petition for rehearing in banc be, and the same is hereby DENIED.